

20  
No. 90-1038-CFX  
Status: GRANTED

Title: Thomas Cipollone, Individually and as Executor of  
the Estate of Rose D. Cipollone, Petitioner  
v.  
Liggett Group, Inc., et al.

Docketed:

December 28, 1990

Court: United States Court of Appeals  
for the Third Circuit

Counsel for petitioner: Edell, Marc Z.

Counsel for respondent: Naar, Alan S., Spaeth, Melvin, Farr  
III, H. Bartow

11/21: Ord. granting ext. of time to file, to and  
incl. 12/28, by Souter, J. (CITED); 40 copies of  
pet. and sep. app. mailed 12/28 and recd. 1/2.

Entry	Date	Note	Proceedings and Orders
26	Nov 21 1990	G Application (A90-389) to extend the time to file a petition for a writ of certiorari from November 28, 1990 to January 27, 1991, submitted to Justice Souter.	
27	Nov 21 1990	Application (A90-389) granted by Justice Souter extending the time to file until December 28, 1990.	
1	Dec 28 1990	G Petition for writ of certiorari filed.	
2	Dec 28 1990	Appendix of petitioner Thomas Cipollone, etc. filed.	
4	Jan 23 1991	Order extending time to file response to petition until March 1, 1991.	
5	Jan 23 1991	The above extension is for all respondents.	
6	Feb 28 1991	Brief of respondents Liggett Group, et al. and appendix in opposition filed.	
7	Mar 6 1991	DISTRIBUTED. March 22, 1991	
8	Mar 25 1991	Petition GRANTED.	
		*****	
10	Apr 8 1991	Order extending time to file brief of petitioner on the merits until May 24, 1991.	
11	May 23 1991	Brief amici curiae of American Cancer Society, et al. filed.	
12	May 23 1991	Brief amicus curiae of American College of Chest Physicians filed.	
15	May 23 1991	Brief amici curiae of Minnesota, et al. filed.	
24	May 23 1991	Brief amici curiae of Six Former Surgeons General of the U.S., et al. filed.	
13	May 24 1991	Brief amicus curiae of Association of Trial Lawyers of America filed.	
14	May 24 1991	Brief amicus curiae of Trial Lawyers for Public Justice, P.C. filed.	
16	May 24 1991	Brief amicus curiae of American Medical Association filed.	
17	May 24 1991	Brief amicus curiae of National League of Cities, et al. filed.	
19	May 24 1991	Brief of petitioner Thomas Cipollone filed.	
20	May 24 1991	Joint appendix filed.	
22	Jun 7 1991	Order extending time to file brief of respondent on the merits until July 10, 1991.	
25	Jul 10 1991	Brief of respondents Liggett Group, et al. filed.	
29	Jul 10 1991	Brief amicus curiae of Assn. of National Advertisers, Inc.	



Entry	Date	Note	Proceedings and Orders
			filed.
30	Jul 10 1991	Brief amicus curiae of National Association of Manufacturers	filed.
31	Jul 10 1991	Brief amicus curiae of Product Liability Advisory Council, Inc.	filed.
28	Jul 12 1991		CIRCULATED.
32	Jul 19 1991		SET FOR ARGUMENT TUESDAY, OCTOBER 8, 1991. (1ST CASE)
33	Jul 30 1991		Certified copy of original, 8 vol. appendicies, briefs, proceedings received. BOX.
34	Aug 1 1991		Certified copy of original record received. 3 boxes.
35	Aug 12 1991	X Reply brief of petitioner Thomas Cipollone, etc.	filed.
37	Oct 8 1991		ARGUED.
36	Oct 21 1991		This case is restored to the calendar for reargument.

①  
**90-1088**

No.

**FILED**

**DEC 28 1990**

**JOSEPH F. SPANIO, JR.**  
**CLERK**

In The

**Supreme Court of the United States**

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October Term, 1990

THOMAS CIPOLLONE, individually and as Executor of the  
Estate of Rose D. Cipollone,

*Petitioner,*

vs.

LIGGETT GROUP, INC., a Delaware Corporation; PHILIP  
MORRIS INCORPORATED, a Virginia Corporation; and  
LOEW'S THEATRES, INC., a New York Corporation,

*Respondents.*

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**PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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MARC Z. EDELL  
BUDD LARNER GROSS ROSENBAUM  
GREENBERG & SADE, P.C.

*Attorneys for Petitioner*

150 John F. Kennedy Parkway, CN 1000  
Short Hills, New Jersey 07078-0999  
(201) 379-4800

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## QUESTIONS PRESENTED

1. Whether the Federal Cigarette Labeling and Advertising Act, which requires warning labels on cigarette packages and advertisements, preempts state tort claims premised on the adequacy of the health warnings or the propriety of the cigarette manufacturers' advertising practices.

2. Whether the Federal Cigarette Labeling and Advertising Act preempts state intentional tort claims premised on the cigarette manufacturers' suppression of cigarette-related health information and their intentional deception of consumers regarding the nature and extent of the health hazards of smoking.



## PARTIES

The parties appearing in the United States Court of Appeals for the Third Circuit were Antonio Cipollone, individually and as executor of the estate of Rose D. Cipollone, appellee below, and three cigarette manufacturers: Liggett Group, Inc., Philip Morris, Inc., and Loew's Theatres, Inc., appellants below.

The petitioner for this writ of certiorari is Thomas Cipollone (the alternate executor of the estate of Rose D. Cipollone and the individual to be substituted as executor for the estate of Antonio Cipollone). The respondents are Liggett Group, Inc., Philip Morris, Inc. and Loew's Theatres, Inc.

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No.

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In The

**Supreme Court of the United States**

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October Term, 1990

THOMAS CIPOLLONE, individually and as Executor of the  
Estate of Rose D. Cipollone,

*Petitioner,*

vs.

LIGGETT GROUP, INC., a Delaware Corporation; PHILIP  
MORRIS INCORPORATED, a Virginia Corporation; and  
LOEW'S THEATRES, INC., a New York Corporation,

*Respondents.*

---

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

---

**OPINIONS BELOW**

The opinion of the Court of Appeals for the Third Circuit is reported at 893 F.2d 541 (3d Cir. 1990) (1a). A prior opinion of the Third Circuit in this case, which decided the question of preemption on a certified interlocutory appeal, is reported at 789

F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987) (95a). The District Court's original opinion is reported at 593 F. Supp. 1146 (D.N.J. 1984) (109a).

### STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit denied petitioner's timely petition for rehearing *en banc* on August 30, 1990. Petitioner seeks review of this judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

On November 21, 1990 this Court granted petitioner a thirty-day extension to file this petition until December 28, 1990 (163a).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case requires the Court to analyze the preemptive scope of the Federal Cigarette Labeling and Advertising Act (hereafter the "Act" or "Cigarette Act"), 15 U.S.C. § 1331, *et seq.*

Effective January 1, 1966, Section 1333 of the Act required cigarette manufacturers to alert consumers: "Caution: Cigarette Smoking May be Hazardous to Your Health." In 1970, Congress determined that the 1966 warning was inadequate.<sup>1</sup> It amended

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1. The Federal Trade Commission's first report to Congress in 1967 on the effectiveness of the federally-mandated health warning concluded that:

[I]f the public is to be effectively warned of the health hazards of cigarette smoking, the Commission is convinced that the present cautionary statement on cigarette packages is not sufficient to accomplish the result.

FTC Report to Congress, Pursuant to Federal Cigarette Labeling and Advertising  
(Cont'd)

the Act to require: "Warning: The Surgeon General Has Determined that Smoking is Dangerous to Your Health." In 1985, the Act was again amended to include four more specific and graphic health warnings on a rotating basis.

Section 1331 of the Act contains the following statement of policy and purpose:

It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette

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(Cont'd)

Act, at 7 (June 30, 1967). The report further concluded that:

the warning label on cigarette packages has not succeeded in overcoming the prevalent attitude toward cigarette smoking created and maintained by the cigarette companies through their advertisements, particularly the barrage of commercials on television, which portray smoking as a harmless and enjoyable social activity that is not habit forming and involves no hazards to health.

*Id.* at 28.



labeling and advertising regulations with respect to any relationship between smoking and health.

Congress included within the Act a provision regarding preemption, and it is this provision which is now before this Court for interpretation and application. Congress stated:

(a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334.

Petitioner concedes that this section prohibits states from regulating cigarette packaging, and cigarette advertising by, for example, requiring a warning other than that set forth in the Act. Petitioner argues, however, that this provision does not preempt state common law tort claims such as those asserted by petitioner.

## STATEMENT OF THE CASE

### A. Basis for Federal Jurisdiction

This diversity action was brought in the District Court for the District of New Jersey under 28 U.S.C. § 1332(a)(1). The petitioner resided in New Jersey; each of the respondent manufacturers has its principal place of business in a state other than New Jersey; the amount in controversy exceeds \$50,000, excluding interest and costs.

### B. Petitioner's Background and Factual Allegations

Rose Cipollone smoked respondents' cigarettes from 1942 until 1982, when her lung was removed.<sup>2</sup> Mrs. Cipollone died on October 21, 1984 from the metastasis of her smoking-induced lung cancer. At her death, her husband Antonio Cipollone continued the lawsuit. Mr. Cipollone died in January 1990; Mr. and Mrs. Cipollone's son, Thomas, now maintains the suit.

In 1983, Mrs. Cipollone brought this products liability action against Liggett Group Inc., Philip Morris, Inc., and Loew's Theatres, Inc. (Lorillard, Inc.), the companies that manufactured the cigarettes she smoked.

The complaint alleged that the cigarette manufacturers failed to adequately warn Mrs. Cipollone of the health consequences of smoking. Rose Cipollone did not know about the dangers of cigarette use when she began smoking in 1942. Evidence adduced at trial, however, indicates that respondents were or should have been well aware by 1942 that smoking posed a serious health risk to smokers. The 1966 congressionally-mandated warning eventually placed on cigarette packages that smoking "may be hazardous to your health," did not adequately convey the nature or extent of the health risks of smoking. Moreover, respondents' public relations and promotional efforts were designed to undermine the effectiveness of the warning by disputing all health claims so as to convince the public that a controversy existed with no established scientific proof of cancer causation. In this regard, the complaint also alleged that respondents' promotion of their products intentionally subverted or at least neutralized the effectiveness

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2. The facts contained in this section primarily derive from the trial court's findings of fact in *Cipollone v. Liggett Group, Inc.*, 683 F. Supp. 1487 (D.N.J. 1988).

of the health warnings required by the Cigarette Act.<sup>3</sup>

Mrs. Cipollone testified that respondents' advertising directly influenced her to begin smoking and later to switch to low tar cigarettes that respondents had led her to believe were "milder" and "safe."<sup>4</sup> Mrs. Cipollone believed the press releases and promotional materials issued by the tobacco companies and their trade association, which denied any causal "link" between smoking and lung cancer. Mrs. Cipollone credited news articles, some directly attributable to cigarette manufacturers and some which, unbeknownst to her, were ghost-written by employees of the cigarette companies claiming for example, that the cigarette-cancer link was "bunk."

### C. Procedural History

In 1984, the District Court held that the Cigarette Act does

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3. See *supra*, note 1.

4. The Federal Trade Commission Report to Congress in 1967 also concluded that

[M]any smokers would like to give up the habit, but don't and won't. Some of them have switched to brands that they believe, often erroneously, to be less hazardous. . . . [M]illions of smokers will continue to be deceived by false claims of "mildness" and misleading portrayals of filters.

FTC Report to Congress, Pursuant to Federal Cigarette Labeling and Advertising Act, at 28 (June 30, 1967).

5. See, e.g., headline story in the National Enquirer, "Cigaret Cancer Link is Bunk," (Mar. 3, 1968) (227a) written by an employee of the cigarette manufacturers' public relations firm. The story acknowledges no connection between the industry and the author. Because of the Third Circuit's preemption decision, the jury was not permitted to hear any evidence at trial about the cigarette companies' role in the authorship of this and similar articles.

not preempt petitioner's state based tort claims. 593 F. Supp. at 1146, 1171 (162a). The Third Circuit, however, on interlocutory appeal issued a brief but sweeping opinion reversing the trial court's decision on federal preemption. It held:

the Act preempts those state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes.

The Circuit Court stated that while the Cigarette Act did not expressly or even impliedly preempt state tort claims, such claims were preempted by the Act under the "actual conflict" prong of the preemption doctrine. 789 F.2d at 186-87 (104a-105a).<sup>6</sup>

In so holding, the Third Circuit did not discuss any of the Act's legislative history, *id.* at 186 (103a), which reflects clear statements of legislative intent to *preserve* state law tort claims. *Cipollone, supra*, 593 F. Supp. at 1161-63 (142a to 146a).

This Court denied certiorari on the Third Circuit's interlocutory preemption decision. 479 U.S. 1043 (1987) (94a). Although that certiorari petition raised the same issues presented in this petition, the procedural posture on this appeal is much different. First, a direct conflict now exists between the Third Circuit and the New Jersey Supreme Court. Second, the Third Circuit's ruling on preemption also conflicts with a recent

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6. This Court has held that federal law may preempt state law in three ways: (1) when Congress expressly preempts state power; (2) when the pervasive federal scheme indicates that Congress impliedly intended to occupy the field exclusively; or (3) when an actual conflict exists between the federal regulation and the state regulatory activity. See *English v. General Electric Co.*, \_\_\_ U.S. \_\_\_, 110 S. Ct. 2270, 2275 (1990).

preemption opinion issued by the Supreme Court of Minnesota regarding state intentional tort claims.

On remand, the District Court interpreted the Third Circuit's interlocutory preemption decision as barring all of petitioner's post-1965 (post-Cigarette Act) claims for: failure to warn, fraudulent misrepresentation, express warranty, and conspiracy to defraud. 649 F. Supp. at 664 (D.N.J. 1986).

At the conclusion of a four (4) month trial, the jury awarded \$400,000 to Mr. Cipollone against Liggett on his pre-1966 breach of warranty claim, based on Liggett's false advertising before the enactment of the Cigarette Act. It also concluded that Liggett had a duty to warn its consumers of the health hazards of smoking pre-1966 but failed to do so.<sup>7</sup>

Post-trial appeals were filed by both petitioner and respondents. In a thirty-two page opinion, the Third Circuit considered eleven separate, complicated issues raised by the *Cipollone* trial.<sup>8</sup> Most significant for this writ, the appeals panel reaffirmed the earlier Third Circuit interlocutory preemption decision, citing the Circuit's internal operating procedures that require adherence to Third Circuit precedent and prohibit one panel from overruling a prior panel. 893 F.2d at 581, n. 51 (88a). The court also affirmed the application of preemption to post-1965 intentional torts since such claims would "challenge . . . the propriety of defendants' actions with respect to the advertising and promotion of cigarettes." 893 F.2d at 582 (quoting

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7. No award was made on this claim because of the jury's allocation of comparative fault. This issue, however, has been remanded for a new trial as the Third Circuit concluded that the trial court's charge on the comparative fault issue was erroneous. 893 F.2d at 570-574 (62a-71a).

8. The Circuit Court provided a table of contents which appears at 893 F.2d at 545.

interlocutory preemption decision, 789 F.2d at 187) (90a). Thus, without expressing enthusiasm or support for the preemption ruling, the panel reaffirmed the holding of the prior panel's interlocutory preemption decision.

Chief Judge Gibbons joined the preemption portion of the opinion only because he felt bound by the prior panel's interlocutory preemption decision. He wrote a separate concurring opinion, however, in which he cited the preemption opinions of this Court and expressed his belief that the Third Circuit's preemption decision was "wrong as a matter of law." 893 F.2d at 583 (92a).



## REASONS FOR GRANTING THE WRIT

### I.

**THE THIRD CIRCUIT'S DECISION IN *CIPOLLONE* ON THE FEDERAL QUESTION OF PREEMPTION IRRECONCILABLY CONFLICTS WITH OPINIONS OF TWO STATE COURTS OF LAST RESORT AND, HENCE, DESERVES THIS COURT'S ATTENTION PURSUANT TO U.S. SUP. CT. R. 10(a).**

**A. The Third Circuit decision directly conflicts with the decision of New Jersey's court of last resort in *Dewey* on the same issue.**

The highest court of the State of New Jersey (which falls in the Third Circuit) has issued a decision directly in conflict with the Third Circuit's preemption opinion in *Cipollone*. Both cases address the preemptive scope of the Federal Cigarette Labeling Act. Both involve post-Act failure to warn claims against cigarette manufacturers. Both arise in almost the identical factual and legal context. This split of authority on this important federal question has severe practical consequences. If a plaintiff brings a state law based product liability action against a cigarette manufacturer in federal court in New Jersey, all post-1965 claims premised on the inadequacy of the warnings, the manufacturers' advertising practices or intentional wrongdoing are barred. If the same plaintiff were to bring an identical lawsuit in state court in New Jersey, *none* of these claims would be barred.

The very existence of this split in authority cries out for intervention by the Supreme Court. This case falls squarely within Supreme Court Rule 10(a) because the Third Circuit "has decided a Federal question in a way in conflict with a state court of last resort."

*Cipollone* was the first federal appellate case to interpret the preemptive scope of the Cigarette Act. It held that state law damage actions that challenge (1) "the adequacy of the warning on cigarette packages" or (2) "the propriety of a party's actions with respect to the advertising and promotion of cigarettes" are preempted under the "actual conflict" prong of preemption. 789 F.2d at 187 (106a).<sup>9</sup>

In reaching its decision on preemption, the Third Circuit described the Cigarette Act as a "carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the national economy." *Id.* The court held that damages actions based on inadequate warnings and deceptive advertisements would "upset" this balance, because jury verdicts in such cases would effectively regulate the congressionally-mandated warnings. Manufacturers would be forced to change the warnings on the cigarette packages in response to damage awards.<sup>10</sup> Hence state-based product liability claims would impermissibly conflict with the purposes of the Act.

The Third Circuit's opinion in *Cipollone* has dominated this issue of national importance. Four federal courts of appeals have followed its preemption

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9. The Third Circuit concluded that although the Act neither expressly nor impliedly preempts such claims, such suits nevertheless are preempted under the "actual conflict prong" of the preemption doctrine. *See supra*, note 6.

10. As the First Circuit explained in *Palmer v. Liggett Group Inc.*, 825 F.2d 620, 627-28 (1st Cir. 1987), a case that followed *Cipollone*:

Once a jury has found a label inadequate under state law, and the manufacturer liable for damages for negligently employing it, it is unthinkable that any manufacturer would not immediately take steps to minimize its exposure to continued liability.

holding.<sup>11</sup> However, this erroneous application of the preemption doctrine was dramatically challenged by the New Jersey Supreme Court decision in *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69 (1990) (181a). *Dewey* parted company with *Cipollone* and its progeny on the question of "actual conflict." 121 N.J. at 86 (198a).<sup>12</sup> After analyzing this Court's actual conflict preemption jurisprudence carefully, *Dewey* concluded that state common law tort remedies do not conflict with the goal of the Cigarette Act to protect consumers.

First, *Dewey* noted this Court's high standard for finding actual conflict. The New Jersey Supreme Court concluded that the threshold had not been met and "refused to accept" the Third Circuit's "assumption" of actual conflict "as the foundation for an 'unambiguous Congressional mandate.'" 121 N.J. at 90 (202a).

Second, *Dewey* rejected the notion advanced by the cigarette manufacturers and adopted by the appellate court in *Cipollone* that state tort actions would have the effect of regulating industry behavior and therefore would necessarily conflict with the Act. Relying heavily on this Court's decision in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), it held that such incidental regulatory effect does not automatically rise to the level of "actual conflict." According to *Dewey*, *Silkwood* "suggests that Congress may be willing to tolerate regulatory consequences of the application of state tort law even where direct state regulation is preempted."

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11. See *Pennington v. Vistrion Corp.*, 876 F.2d 414 (5th Cir. 1989); *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230 (6th Cir. 1988); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987); *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987).

12. It agreed that the Cigarette Act does not meet the first two prongs of preemption — the Act does not expressly preempt common law remedies nor does it impliedly preempt those remedies by occupying the field. 121 N.J. at 86 (198a).

121 N.J. at 89 (201a).<sup>13</sup>

Third, *Dewey* was mindful of the need for uniformity as set out in the statement of policy and purpose in the Cigarette Act, and recognized that state damage actions may indirectly encourage cigarette manufacturers to amend the warnings on their product. The *Dewey* court noted, however, that state damage actions need not undermine the uniformity of the Act. Cigarette manufacturers could respond to tort suits without altering the congressionally-mandated warnings. For instance, manufacturers could pay damage awards, include a package insert, or voluntarily supplement the warnings on the package — all of which would comport with the strictures of the Cigarette Act. *Id.*<sup>14</sup> The New Jersey Supreme Court concluded that the *Cipollone* preemption decision rested on dubious inferences and assertions." 121 N.J. at 86 (197a-198a).

**B. The Third Circuit's decision also conflicts in part with the preemption opinion of Minnesota's court of last resort on the intentional tort issue.**

A more narrow, but no less important conflict exists between *Cipollone* and the Minnesota Supreme Court. In *Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W. 2d 655, 659-62 (Minn. 1989)

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13. The *Dewey* court also relied upon *English v. General Electric Co.*, \_\_\_\_ U.S. \_\_\_\_, 110 S. Ct. 2270 (1990) (nuclear plant liable for intentional infliction of emotional distress of worker fired for whistle-blowing even though the federal regulations provide specific remedies for whistle-blowers under the Energy Reorganization Act) and *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988) ("Congress may reasonably determine that incidental regulatory pressure is acceptable whereas direct regulatory pressure is not.").

14. But, cf., *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 627 (1st Cir. 1987) (following *Cipollone* and rejecting "disingenuous" argument that monetary damages would not compel a change of the warning).

(174a, 177-78a), the Minnesota Supreme Court held that state tort claims based on a state-imposed duty to warn are preempted by the Cigarette Act because such remedies constitute a regulatory scheme. The court disagreed, however, with the Third Circuit's ruling insofar as it applied preemption to post-1965 (post-Act) intentional tort claims. In holding that state damage actions for intentional misrepresentation were not preempted, the Minnesota court reasoned that preempting state action for false misrepresentation would actually subvert the policy of the Cigarette Act. It would allow cigarette manufacturers to actively and intentionally mislead consumers. *Forster* distinguished intentional misrepresentation from mere failure to warn because misrepresentation nullifies the value of the congressionally-mandated warnings. *Id.*

The Minnesota Supreme Court's holding in *Forster* directly conflicts with the decision of the Third Circuit in *Cipollone* that held such claims "unequivocally" preempted because they challenge the "propriety" of the cigarette manufacturers' actions in promoting and advertising cigarettes. 789 F.2d at 187 (106a); 893 F.2d at 582 (90a).

The practical impact of the Third Circuit's decision was best described by the trial court in *Cipollone* in its opinion on remand:

No matter how false or misleading cigarette advertising may be or have been, and even if intentionally so, no state law cause of action may arise on behalf of anyone who may have relied thereon to their detriment or death. Indeed, the tobacco industry evidently can continue to deny or refute the risks of cigarette smoking with impunity and immunity so long as the little rectangle with the necessary language appears in its advertising and on its cigarette packages.

649 F. Supp. 664, 667 (D.N.J. 1986).

This exemplifies the tenuous extreme to which the Third Circuit extended this Court's preemption doctrine. The doctrine now stands not as a protective device for Congress' enumerated powers but as a tool for striking down areas of legitimate state concern.

## II.

### THE THIRD CIRCUIT'S OPINION IGNORES THE PREEMPTION DECISIONS OF THIS COURT, AND UNDERMINES THE PRINCIPLES OF FEDERALISM INHERENT IN THE PREEMPTION DOCTRINE.

#### A. The Third Circuit's opinion conflicts with *Silkwood* and other recent Supreme Court preemption decisions.

In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 257 (1984), this Court held that the Atomic Energy Act did not preempt a state tort action seeking punitive damages for a worker injured at a federally regulated and licensed nuclear plant despite federal law placing "exclusive regulatory authority" over nuclear safety in the United States government.

This Court recognized and addressed the potential for state tort actions to affect the conduct of the nuclear industry. It acknowledged that "an award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability." *Id.* at 256. Nevertheless, preemption was rejected. *See id.*

*Silkwood* relied on Congress' failure to explicitly preempt tort actions and held that such silence "takes on added significance in light of [its] failure to provide any federal remedy for persons



injured by such conduct.” *Id.* at 251. The Court found it incredible that Congress would, *sub silentio*, remove all means of judicial recourse. *Id.* Contrary to this philosophy, the *Cipollone* court completely ignored the fact that the Cigarette Act provides neither a remedy for injured smokers nor an explicit statement evidencing intent to remove all means of judicial recourse.

More recently, in *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988), this Court concluded, despite the fact that the Supremacy Act shielded federally-owned nuclear facilities from “direct state regulation,” that enforcement of a workers’ compensation award for violating safety requirements under state law standards was not preempted because such awards exerted only an “incidental regulatory effect.” 486 U.S. at 1712. Furthermore, like *Dewey*, this Court noted that appellant had the option to “disregard Ohio safety regulations and simply pay an additional workers’ compensation award . . . .” *Id.*

*Goodyear* suggests that courts should examine the options available to the regulated entity before jumping to the conclusion that state damage suits actually conflict with a statute.<sup>15</sup> As in *Goodyear*, the respondents in *Cipollone* retain the option of paying for the damage they cause without altering their regulated behavior. Therefore, as in *Goodyear*, the state tort actions should not be preempted.

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15. See also, *English v. General Electric Co.*, \_\_\_ U.S. \_\_\_, 110 S. Ct. 2270 (1990) (nuclear power plant employee maintained common law claim for intentional emotional distress based on employer’s alleged whistle-blowing despite tangential interference with Energy Reorganization Act); *International Paper v. Ouellette*, 479 U.S. 481 (1987) (Clean Water Act does not preempt New York nuisance action because such preemption would leave plaintiffs without a remedy); *Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985) (rejecting preemption because the federal act contained no remedial provision that would replace state common law remedy).

Mysteriously, aside from citing *Silkwood* for some black letter preemption law, the Third Circuit ignored this seminal case entirely. Instead, the Third Circuit cited older and distinguishable authority to conclude that the regulatory effect of state law damage claims necessarily must conflict with congressional objectives. 789 F.2d at 187 (105a).<sup>16</sup>

Finally, *Cipollone* provides an even more compelling basis for rejecting preemption than does *Silkwood*. The primary purpose of the Atomic Energy Act in *Silkwood* is to promote the nuclear power industry while at the same time protecting the public. In contrast, the *primary* goal of the Cigarette Act is to inform the public of the health hazards associated with smoking, which perforce undercuts the marketability of the product. The Cigarette Act specifically subordinates the policy of fostering the cigarette trade to the loftier goal of protecting public health and safety. Compare, 15 U.S.C. § 1331(1) and (2).

**B. The Third Circuit opinion in *Cipollone* misapplied the “actual conflict” prong of preemption, disregarded the state’s strong interest in providing traditional tort remedies and continues to generate confusion in product liability matters far removed from tobacco litigation.**

The Third Circuit paid lip service to the narrow scope of

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16. The Third Circuit quoted *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), as authority for the proposition that state damage actions should be preempted. *Garmon* explained that

regulation can be as effectively exerted through an award of damages as through some form of preventative relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.

*Id.* at 246-47. The Labor Act in *Garmon* involved a pervasive scheme for compensation that would have been frustrated entirely by separate state suits

(Cont’d)

preemption and the sanctity of traditional state rights and remedies.<sup>17</sup> However, in substance, the Third Circuit failed to heed this Court's admonition "not [to] decree such a federal displacement 'unless it was the clear and manifest purpose of Congress.' " *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)).

Most significant, the Third Circuit misapplied this Court's teachings on the "actual conflict" prong of implied preemption. See *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 204 (1983) (state law is preempted "to the extent it actually conflicts with federal law."). This Court has emphasized that to justify preemption, the conflict must be unavoidable and that "compliance with both federal and state regulations is a physical impossibility." *Florida Lime & Avocado Growers Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). Further, evidence of actual conflict cannot be merely "hypothetical" or "potential." See *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982).

(Cont'd)

for compensation. *Garmon* is distinguishable from the Cigarette Act, which includes no compensation scheme. Furthermore, the language of *Garmon* does not fully apply to this case because there is no presumption in favor of federal preemption, as there is in cases involving the NLRB.

17. The court stated that it was "constrained by the presumption against preemption." 789 F.2d at 185 (102a). It also observed that

the Cipollones' tort action concerns rights and remedies traditionally defined solely by state law. We therefore must adopt a restrained view in evaluating whether Congress intended to supersede entirely private rights of action such as those at issue here.

789 F.2d at 186 (140a).

The Third Circuit's finding that "state common law damage actions have the effect of requirements that *are capable* of creating" an actual conflict, 789 F.2d at 187 (105a) (emphasis supplied), relies on potential, not actual conflict or frustration of purpose. The mere "capability of conflict" simply does not satisfy the high threshold this Court has set out for preemption.

The Third Circuit opinion in *Cipollone* dangerously disrupts the delicate balance between the states' interest in protecting their citizens through traditional tort remedies and the federal government's interest in uniform and unfettered regulatory control. The Third Circuit failed to recognize that state-damage claims advance an essential independent goal apart from their incidental regulatory effect: compensating injured citizens. It overstates the federal interest in preempting state law, devalues the state's interest in their citizens' health and safety, and leaves injured citizens without a remedy.<sup>18</sup>

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18. As noted by the 1986 Report of the Working Group on Federalism,

There is . . . no question that Congress can, by explicit legislation, displace state regulation in any field whose boundaries lie entirely within the reach of one of Congress' enumerated powers. But it is quite a different matter for a court to declare an entire field of state law preempted in the absence of an express statement to that effect . . . [A] decision improperly limiting state decisionmaking authority obviously represents a direct and illegitimate alteration in the federal-state relationship established by the Constitution . . . [A]ny judicial decision that departs from the original meaning of the Constitution does serious damage to the structure of constitutional federalism . . .

Working Group on Federalism, Domestic Policy Council, *The Status of Federalism in America: A Report of the Working Group on Federalism of the Domestic Policy Council* at 40-41, 43 (November 1986) (emphasis in original).



The Third Circuit preemption opinion in *Cipollone* and its progeny have fostered dispute and confusion in areas outside of tobacco litigation, where those opinions have provided the basis for the dubious argument that preemption applies whenever a company has complied with a federally imposed warning requirement.

Heretofore, courts have generally agreed that mere compliance with federally mandated labeling requirements does not immunize manufacturers from suits based on their failure to warn of inherent dangers in their products.<sup>19</sup> The Third Circuit opinion, however, seems to challenge that consensus and has already begun to confuse other courts. This confusion is understandable because logically, the Third Circuit's analysis in *Cipollone* could preempt state court product liability suits for *all* products that carry federal warning labels. Clearly, the Third Circuit in *Cipollone* misunderstood the congressional policies expressed in the Cigarette Act. This Court must therefore address the preemption issue in a product liability context.

In *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir. 1982), *cert. denied*, 469 U.S. 1062 (1984), the Court of Appeals for the District of Columbia, relying in large part on this Court's holding in *Silkwood*, held that chemical manufacturers' compliance with the labeling requirements of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") does not preempt state tort actions based on the inadequacy of

19. See, e.g., *MacDonald v. Ortho Pharmaceutical Corp.*, 394 Mass. 131, 475 N.E. 2d 65 (1985); *Feldman v. Lederle Laboratories*, 97 N.J. 429, 461 (1984). (No preemption of product liability suits against drug manufacturers for failure to warn of risks, even though the FDA prescribes specific, national uniform warnings.) *Cipollone* renewed efforts to raise preemption in pharmaceutical cases. See, e.g., *Spychala v. G.D. Searle & Co.*, 705 F. Supp. 1024, 1031 (D.N.J. 1988); *Hurley v. Lederle Laboratories, Div. of American Cyanamid Co.*, 651 F. Supp. 993, 998, n.5 (E.D. Tex. 1986), *rev'd*, 863 F.2d 1173 (5th Cir. 1988).

an EPA-approved label. The court reasoned that a state jury verdict does not automatically "require" a manufacturer to change its labels, but rather, leaves the manufacturer the choice of petitioning for a more comprehensive label or paying damages. *Id.* at 1542.

Recently, however, several lower courts, in deciding the preemptive effect of FIFRA, have rejected *Ferebee* in favor of the reasoning of *Cipollone* and *Palmer*. Like the cigarette cases, the focus of the dispute involves the application of the "actual conflict" prong of the preemption analysis.<sup>20</sup>

In the pharmaceutical field, the courts also disagree about the application of the actual conflict test as set forth in this Court's analysis in *Silkwood*. Numerous decisions hold that FDA regulations set minimum warning standards but do not conflict with state common law which may, by virtue of a jury verdict, establish liability for failure to comply with a different warning standard.<sup>21</sup>

20. See *Fitzgerald v. Mallinckrodt Inc.*, 681 F. Supp. 404 (E.D. Mich. 1987); *Kennan v. Dow Chemical Co.*, 717 F. Supp. 799, 805-06 (M.D. Fla. 1989); *Fisher v. Chevron Chemical Co.*, 716 F. Supp. 1283, 1287-88 (W.D. Mo. 1989). Other lower courts reject the applicability and/or reasoning of *Cipollone* and its progeny and continue to hold that FIFRA has no preemptive effect for such claims. In doing so, however, these courts perform semantic handsprings to distinguish *Cipollone* and *Palmer*, in order to follow the diametrically opposed reasoning of *Ferebee*. See *Cox v. Velsicol Chemical Corp.*, 704 F. Supp. 85, 87 (E.D. Pa. 1989); *Roberts v. Dow Chemical Co.*, 702 F. Supp. 195, 197-99 (N.D. Ill. 1988).

21. See, e.g., *Allen v. G.D. Searle & Co.*, 708 F. Supp. 1142 (D. Or. 1989); *Kociemba v. G.D. Searle & Co.*, 680 F. Supp. 1293, 1299 (D. Minn. 1988); *Graham by Graham v. Wyeth Labs, a Div. of American Home Products Corp.*, 666 F. Supp. 1483 (D. Kan. 1987).



Other courts have found in favor of preemption on the grounds that imposition of damages under state tort law would be equivalent to state-imposed warning requirements and hence would conflict with FDA warning regulations.<sup>22</sup>

In sum, *Cipollone's* expansive view of preemption "has the burning force of a prairie fire, and it is hard to see what structures of state compensation would survive the ensuing conflagration." L. Tribe, "Anti-Cigarette Suits: Federalism with Smoke and Mirrors," *The Nation* 788 (June 7, 1986). The Third Circuit distorted and misstated preemption law, demeaning and endangering the principles of federalism that underlie it. The confusion created by these decisions cries out for clarification by this Court.

### III.

#### **AS THE MINNESOTA SUPREME COURT HELD IN DISAGREEING WITH *CIPOLLONE*, EVEN ASSUMING THAT THE CIGARETTE ACT PREEMPTS CLAIMS RELATED TO MANUFACTURER WARNINGS, IT DOES NOT PRECLUDE PETITIONER'S INTENTIONAL TORT CLAIMS.**

The Supreme Court of Minnesota recognized the crucial distinction for preemption analysis between intentional torts and other claims based on manufacturers' warnings. In *Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655, 662 (Minn. 1989) (177a),

22. See *Lindquist v. Tambrands, Inc.*, 721 F. Supp. 1058, 1062 (D. Minn. 1989); *Rinehart v. International Playtex, Inc.*, 688 F. Supp. 475, 477 (S.D. Ind. 1988); *Stewart v. International Playtex, Inc.*, 672 F. Supp. 907, 910 (D.S.C. 1987); *Berger v. Personal Products, Inc.*, 115 Wash. 2d 267, 797 P.2d 1148 (1990). Cf. *Moore v. Kimberley-Clark Corp.*, 867 F.2d 243 (5th Cir. 1989); *Lavetter v. International Playtex Inc.*, 706 F. Supp. 722 (D. Ariz. 1988).

the Minnesota Supreme Court found that the Cigarette Act preempts state damage actions based on the federally mandated warnings. However, the court specifically distinguished intentional torts and held that the Cigarette Act does not preempt a claim for intentional misrepresentation. The court explained that an action for common law misrepresentation "is based on a duty to tell the truth, not on a duty to warn" *Id.* The Supreme Court of Minnesota noted that such a cause of action challenges not the adequacy of warning, but "what the cigarette manufacturer has chosen to say." It observed further that to find that the Cigarette Act preempted damage actions for intentional misrepresentation

we would have to assume that Congress intended the Act to be a license to lie, an assumption both uncharitable to Congress and violative of this state's deep concern for honesty as well as health.

*Id.* at 662 (178a).

The Third Circuit erred in holding that the Cigarette Act preempts intentional tort claims.<sup>23</sup> Even if the preemptive scope of the Cigarette Act did extend to actions based on manufacturers' warnings, it could not conceivably extend to intentional misrepresentation by the cigarette manufacturers. There is an obvious logical distinction between failure to warn, which derives from breach of an existing duty, and intentional misrepresentation,

23. Petitioner argued that even if the Cigarette Act preempted post-1965 claims based on the warnings, it did not preclude post-1965 counts for intentional misrepresentation. The Third Circuit, however, affirmed the District Court's application of preemption to intentional torts. It held that petitioner's intentional tort claims fell within the interlocutory preemption holding because they "challenge . . . the propriety of defendant's actions with respect to the advertising and promotion of cigarettes." 893 F.2d at 582 (quoting interlocutory preemption decision. 789 F.2d at 187) (90a).

which emanates from respondents' affirmative and gratuitous undertaking to misrepresent facts to the public.

The arguments favoring preemption, discussed by *Cipollone* and its progeny, simply do not apply to intentional torts. Liability imposed for intentional torts would not impose additional warning requirements on respondents; it would not affect the content or uniformity of the warnings. Therefore, such actions do not trigger an "actual conflict" and certainly do not "frustrate the purpose" of the Act.

Instead, liability for intentional misrepresentation would have the salutary effect of inhibiting cigarette manufacturers from lying about their products. It would deter respondents from undertaking affirmative public relations efforts to mislead current smokers and attract new addicts. If the Cigarette Act warnings indeed represent the proper balance between human health and the health of the cigarette industry, then that compromise can only be realized if the consumers find the warnings credible. Therefore, rather than frustrate the purpose of the Act, such liability would *promote* the compromise inherent in the Cigarette Act by preventing the manufacturers from undermining or nullifying the required warnings.

## CONCLUSION

Wherefore, petitioner respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

MARC Z. EDELL  
BUDD LARNER GROSS  
ROSENBAUM GREENBERG &  
SADE, P.C.  
*Attorneys for Petitioner*

MARC Z. EDELL  
CYNTHIA A. WALTERS  
AVIVA ORENSTEIN  
*On the Petition*

90-1088

(2)

Supreme Court, U.S.  
FILED

DEC 28 1990

JOSEPH F. SPANIOLO, JR.  
CLERK

No.

In The

# Supreme Court of the United States

October Term, 1990

THOMAS CIPOLLONE, individually and as Executor of the  
Estate of Rose D. Cipollone,

*Petitioner,*

vs.

LIGGETT GROUP, INC., a Delaware Corporation; PHILIP  
MORRIS INCORPORATED, a Virginia Corporation; and  
LOEW'S THEATRES, INC., a New York Corporation,

*Respondents.*

## APPENDIX

BUDD LARNER GROSS PICILLO  
ROSENBAUM GREENBERG & SADE, P.C.

*Attorneys for Petitioner*

150 John F. Kennedy Parkway, CN 1000

Short Hills, New Jersey 07078-0999

(201) 379-4800

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**APPENDIX A — OPINION OF THE UNITED STATES  
COURT OF APPEALS FOR THE THIRD CIRCUIT DATED  
JANUARY 5, 1990**

**Antonio CIPOLLONE, individually and as Executor of the Estate  
of Rose D. Cipollone,**

**v.**

**LIGGETT GROUP, INC., a Delaware Corporation; Philip Morris  
Incorporated, A Virginia Corporation, and Lorillard, Inc., A New  
York Corporation.**

**Appeal of PHILIP MORRIS, INC.**

**Appeal of LORILLARD, INC.**

**Appeal of LIGGETT GROUP, INC.**

**Nos. 88-5732, 88-5570, 88-5771, 88-5784.**

**United States Court of Appeals,  
Third Circuit.**

**Argued March 28, 1989.**

**Decided Jan. 5, 1990.**

**Marc Z. Edell (argued), Cynthia A. Walters, Budd Larner  
Gross Picillo Rosenbaum Greenberg & Sade, P.C., Short Hills,  
N.J., Alan M. Darnell, Wilentz, Goldman & Spitzer, Woodbridge,  
N.J., for appellant Antonio Cipollone.**

**Thomas E. Silfen (argued), Brown & Connery, Westmont,  
N.J., Arnold & Porter, Washington, D.C., Shook, Hardy &**



## Appendix A

Bacon, Kansas City, Mo., for appellant Philip Morris, Inc.

Robert E. Northrip (argued), Rhonda E. Fawcett, W. Edward Reeves, Shook, Hardy & Bacon, Kansas City, Mo., William S. Tucker, Jr., Stryker, Tams & Dill, Newark, N.J., for appellant Lorillard, Inc.

Donald J. Cohn (argued), James V. Kearney, Webster & Sheffield, New York City, Alan S. Naar, Greenbaum, Rowe, Smith, Ravin, Davis & Bergstein, Woodbridge, N.J., for appellant Liggett Group, Inc.

Before GIBBONS, Chief Judge, BECKER and NYGAARD, Circuit Judges.

## OPINION OF THE COURT

BECKER, Circuit Judge.

## I. INTRODUCTION

This appeal is from a final judgment in a protracted products liability case in which the plaintiff, Antonio Cipollone, seeks to hold Liggett Group, Inc., Lorillard, Inc., and Philip Morris, Inc., three of the leading firms in the tobacco industry, liable for the death from lung cancer of his wife, Rose Cipollone, who smoked cigarettes from 1942 until her death in 1984. Jurisdiction is founded on diversity of citizenship, 28 U.S.C. § 1332, and New Jersey law applies. In an earlier opinion in the case, *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043, 107 S.Ct. 907, 93 L.Ed.2d 857 (1987), we held that the Federal Cigarette Labeling and Advertising Act ("Labeling Act"), 15 U.S.C. §§ 1331-1340 (1982 & Supp. II 1984), which became

## Appendix A

effective January 1, 1966, preempted claims arising from smoking after January 1, 1966 (hereinafter post-1965) based upon the cigarette companies' advertising or promotion of cigarettes or upon the adequacy of their warnings as to the hazards of smoking.

Following that opinion, which stemmed from an interlocutory appeal, *see* 28 U.S.C. § 1292(b), the case proceeded to a four-month long trial. At the conclusion of the trial, the jury, answering a series of special interrogatories, returned a verdict in the sum of \$400,000.00 for the plaintiff in his individual capacity on the breach of express warranty claim. The jury also found the defendants strictly liable for failing to warn adequately of the hazards of their products, but returned a verdict in their favor on that claim because of Mrs. Cipollone's comparative fault. More precisely, the jury apportioned 80% of the responsibility for Mrs. Cipollone's injuries to her because of its finding that she knew and appreciated the damages of cigarette smoking and voluntarily chose to smoke.

Both sides have appealed, raising a plethora of issues. The prime defendant is Liggett Group, Inc. ("Liggett"), whose cigarettes Mrs. Cipollone smoked from 1942 to 1968. The briefs focus primarily on alleged errors in the district court's charge to the jury and on specific jury findings that may have preclusive effect. Considerable attention was also devoted to ancillary issues: the viability of the plaintiff's generic risk-utility theory of liability (the district court granted summary judgment for the defendants thereon); the failure of the district court to award plaintiff prejudgment interest; the district court's grant to plaintiff of partial summary judgment on defendants' statute of limitations defense; and the effect of our preemption decision on plaintiff's intentional tort claims (the district court held them to be preempted).

## Appendix A

The most problematic issue on this appeal lies in the skewing effect on the trial of our interlocutory preemption decision, which created an artificial (although legally binding) time constraint on the determination of causation and liability. Under the aegis of that decision, the jury was forbidden to consider the effect of the defendants' post-1965 conduct and, concomitantly, could only consider whether a pre-1966 breach of warranty and failure to warn was the proximate cause of Mrs. Cipollone's smoking and death. However, the district court allowed the jury to consider Mrs. Cipollone's post-1965 smoking, on the theory that her post-1965 behavior was relevant to a comparative fault defense.

We conclude that the district court erred in permitting the jury to make a comparative fault determination based on Mrs. Cipollone's post-1965 behavior. Rather, the jury should have been instructed that Mrs. Cipollone's post-1965 conduct bore only on the apportionment of damages, but not on her comparative fault for her own injuries. Although in some respects the fairest and most natural approach would be to let the jury consider both sides' post-1965 conduct to the extent that it bears on apportionment of damages, that result would impermissibly impinge on the immunity from suit afforded the cigarette companies by the Labeling Act. Still, permitting the defendants to take advantage of Mrs. Cipollone's post-1965 conduct to escape liability altogether, particularly in the face of plaintiff's allegations that defendants engaged in post-1965 conduct designed to reassure smokers, creates an unacceptable imbalance.

The only way to give effect to our preemption decision and yet ensure fairness in the trial is to limit the evidence going to Mrs. Cipollone's comparative fault to her pre-1966 conduct. We find this result to be consistent with, and indeed compelled by, the New Jersey Supreme Court decision in *Ostrowski v. Azzara*,

## Appendix A

111 N.J. 429, 545 A.2d 148 (1988). Thus, Mr. Cipollone is entitled to a new trial on his failure to warn claim.

Liggett's appeal on the express warranty claim presents an abstruse question about the nature of the reliance interest required by U.C.C. section 2-313, N.J.S.A. § 12A:2-313. The attention we pay to this issue on appeal is somewhat ironic, given that the extensive trial focused on other theories of liability, particularly strict liability. The jury's verdict for the plaintiff on an express warranty theory makes our analysis necessary, however.

We conclude that the express warranty charge was flawed and that that portion of the verdict must also be set aside. Primarily, the district court erred to the extent that it prevented Liggett from proving, by a preponderance of the evidence, that Mrs. Cipollone did not believe the advertisements. The advertisements constitute an express warranty as long as they constitute a basis of the bargain, that is, as long as Mr. Cipollone can prove that Mrs. Cipollone was aware of the advertisements and as long as Liggett does not prove that she disbelieved them.

We conclude that the district court did not err in barring a comparative fault defense to the express warranty claim because, on the facts of this case, it would have been impossible for Mrs. Cipollone to have known of the dangers of smoking and still have believed enough in Liggett's advertisements for them to constitute a warranty. In essence, the comparative fault issue collapses into the basis of the bargain issue. We further conclude that the district court did not err in denying Liggett's motion for judgment n.o.v., because there was sufficient evidence in the record to support conclusions that a warranty existed and was breached and that breach of that warranty proximately caused Mrs. Cipollone's cancer.



*Appendix A*

We reverse the district court's grant of summary judgment to defendants on plaintiff's generic risk-utility claim. Although our holding on this issue is subject to instant modification by the New Jersey Supreme Court, which presently has the issue before it, we find that the district court improperly granted defendant's motion for a directed verdict. Thus, plaintiff still has live claims against all three defendants in this case; although Mrs. Cipollone did not smoke cigarettes made by Lorillard and Philip Morris until after 1965 (hence absolving them from liability on the breach of express warranty and failure to warn claims), they remain potentially liable on the risk-utility claim, which does not implicate advertising, promotion or warnings. We also conclude that if Mr. Cipollone prevails on an express warranty claim on retrial, he is entitled to prejudgment interest. We reverse the district court's grant of partial summary judgment for the plaintiff on the statute of limitations issue because we conclude that there was a genuine issue of material fact as to whether, within the meaning of the New Jersey discovery rule, Mrs. Cipollone should have discovered the facts giving rise to her claim earlier. Finally, we agree with the district court that plaintiff's intentional tort claim is preempted by our previous decision.

## II. THE RELEVANT FACTS ADDUCED AT TRIAL

Rose Cipollone was born in 1925 and began to smoke in 1942. She smoked Chesterfield brand cigarettes, manufactured by Liggett, until 1955. In her deposition, introduced into evidence at the trial, she stated that she smoked the Chesterfield brand to be "glamorous," to "imitate" the "pretty girls and movie stars" depicted in Chesterfield advertisements, and because the advertisements stated that Chesterfield cigarettes were "mild." Mrs. Cipollone stated that she understood the description of Chesterfield cigarettes as "mild" to mean that the cigarettes were safe.

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Mrs. Cipollone also testified that she was an avid reader of a variety of magazines, frequently listened to the radio, and often watched television during the years that she smoked the Chesterfield brand. Although she could not specifically remember which Chesterfield advertisements she saw or heard during those years, Chesterfield advertisements appeared continuously in those media during that period. Several of these advertisements were introduced into evidence. The following copy appeared commonly in Chesterfield magazine advertisements during the year 1952:

PLAY SAFE Smoke Chesterfield.

NOSE, THROAT, and Accessory Organs not Adversely Affected by Smoking Chesterfields. First such report ever published about any cigarette. A responsible consulting organization has reported the results of a continuing study by a competent medical specialist and his staff on the effects of smoking Chesterfield cigarettes. A group of people from various walks of life was organized to smoke only Chesterfields. For six months this group of men and women smoked their normal amount of Chesterfields—10 to 40 a day. 45% of the group have smoked Chesterfields continually from one to thirty years for an average of 10 years each. At the beginning and at the end of the six-months period each smoker was given a thorough examination, including X-ray pictures, by the medical specialist and his assistants. The examination covered the sinuses as well as the nose, ears and throat. The medical specialist, after a thorough examination of every member of the group, stated: "It is my opinion that the ears, nose,

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throat and accessory organs of all participating subjects examined by me were not adversely affected in the six-month period by smoking the cigarettes provided."

5 J.A. 21, 22 (c. 1952).<sup>1</sup> The defendants stipulated that Mrs. Cipollone had seen many of these advertisements.

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1. Chesterfield magazine advertisements during this period also contained the following messages:

Chesterfield contains only ingredients that give you the Best Possible Smoke—as tested and approved by scientists from leading universities.

5 J.A. 21 (c. 1952).

[Chesterfield cigarettes contain) PURE, COSTLY MOISTENING proved by over 40 years of continuous use in U.S.A. tobacco products as *entirely safe for use in the mouth*—chemically pure, far most costly glycerol and pure sugars which are natural to tobacco—*nothing else*. . . . Scientists from Leading Universitites *Make Sure* that Chesterfield Contains Only Ingredients that Give You the Best Possible Smoke.

5 J.A. 26 (c.1952).

AND NOW—CHESTERFIELD FIRST TO GIVE YOU SCIENTIFIC FACTS IN SUPPORT OF SMOKING. A responsible consulting organization reports a study by a competent medical specialist and staff on the effects of smoking Chesterfields. For six months a group of men and women smoked only Chesterfield—10 to 40 day—their normal amount. 45 percent of the group have smoked Chesterfield from one to thirty years for an average of ten years each.

(Cont'd)

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Television advertisements for the Chesterfield brand were also introduced into evidence. The Chesterfield cigarette was described as having "ingredients that make Chesterfield the best possible smoke as tested and approved by scientists from leading universities," 5 J.A. 37 (undated), and being manufactured with "electronic miracle" technology that makes "cigarettes . . . more better [sic] and safer for you." 5 J.A. 39 (c. 1955). One advertisement stated "[n]ow Chesterfield is the first cigarette to present this scientific evidence on the effects of smoking—a medical specialist making regular bi-monthly examinations of group of people from various walks of life—45% of this group have smoked Chesterfield's for an average of over 10 years—after 8 months, the medical specialist reports that he observed no adverse effects to the nose, throat and sinuses of the group who were smoking Chesterfield. I'd say that means real mildness." 5 J.A. 36 (undated).

Mrs. Cipollone testified that she frequently listened to the radio show "Arthur Godfrey and His Friends," sponsored by the Chesterfield brand. The Chesterfield brand was marketed on the show as follows (text read by Mr. Godfrey):

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(Cont'd)

At the beginning and end of the six-months, each smoker was given a thorough examination including X-rays, and recovering the sinuses, nose, ears and throat. After these examinations, the medical specialist stated . . . "It is my opinion that the ears, nose, throat and accessory organs of all participating subjects examined by me were not adversely affected in the six-months period by smoking the cigarettes provided."

5 J.A. 23 (c. 1952).



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[Y]ou saw me read this last week but a lot of folks didn't and it's a very important message—especially those of you who smoke Chesterfields—you probably been wonderin' about this. You hear stuff all the time about "cigarettes are harmful to you" this and that and the other thing. . . .

Here's an ad, you've seen it in the papers—please read it when you get it. If you smoke it will make you feel better, really.

"Nose, throat and accessory organs not adversely affected by smoking Chesterfield. This is the first such report ever published about any cigarette. A responsible consulting organization has reported the results of a continuing study by a competent medical specialist and his staff on the effects of smoking Chesterfield cigarettes.

"A group of people from various walks of life was organized to smoke only Chesterfields. For six months this group of men and women smoked their normal amount of Chesterfields—10 to 40 a day. 45% of the group have smoked Chesterfields continually from one to thirty years for an average of 10 years each.

"At the beginning and at the end of the six months period each smoker was given a thorough examination, including X-ray pictures, by the medical specialist and his assistants. The examination covered the sinuses as well as the nose, ears and throat."

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Now—here's the important thing. "The medical specialist, after a thorough examination of every member of the group, stated: 'It is my opinion that the ears, nose, throat and accessory organs of all participating subjects examined by me were not adversely affected in the six-months period by smoking the Chesterfield cigarettes provided.' "

Now that ought to make you feel better if you've had any worries at all about it. I never did. I smoke two or three packs of these things every day. I feel pretty good. I don't know, I never did believe they did you any harm and now, we've got the proof. So—Chesterfields are the cigarette for you to smoke, be they regular size or king-size.

5 J.A. 156 (Sept. 24, 1952).<sup>2</sup>

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2. Many similar Arthur Godfrey advertisements were also introduced into evidence, including the following three:

You know you hear all this applesauce about—you'd better quit smoking, pal, or you won't be here long and stuff.

Listen to this. [At this point Mr. Godfrey told his listeners about the same "medical" study that he had related on September 24.]

There's the story. Were not adversely affected. Chesterfield is the right—[now addressing Tony Marvin, the announcer] Will you hold that over there for me?—Chesterfield—you've been smoking 'em, gosh, Tony, how many do you smoke a day?

(Cont'd)

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In 1955, Mrs. Cipollone stopped smoking Chesterfield

(Cont'd)

[Mr. Marvin]: I run about 2½ packs a day, Arthur.

[Mr. Godfrey]: 2½ packs a day. If he wasn't so tight, he'd smoke 3. LAUGHTER. They're wonderful cigarettes, in either size, you know, king-size, this size here, or the regular size, they're the same tobacco. Go ahead and smok'em and enjoy'em, they're wonderful.

5 J.A. 158 (Oct. 1, 1952).

[I have] a client here, the Chesterfield people, Liggett and Myers are their names. [T]he firm . . . is an honorable one, a trustworthy one. For years and years and years that they have been advertising, you never heard them make an unsubstantiated claim—ever! Certainly, not during the time that I've been with 'em. They came out, not so long ago, with a report by an eminent physician—it's a good report—I suppose there are those who wonder about it.

If you believe in me, and over the 23 years I've been in the radio, you know that I have never yet misled you with advertising. Nobody has been able to buy me enough to do that. If you believe in me, then you take my work that I know this—that the Liggett and Myers people don't make statements that they can't substantiate. And when they say that after this test that they made with the doctor, that after he made it, he comes up and say, quote—'It is my opinion that the ears, nose, throat, and accessory organs of all participating subjects examined by me, were not adversely affected in the six-months period by smoking the cigarettes provided.'

And they mean what they say—that specialist said it. Liggett and Myers have substantiated it. Remember that when

(Cont'd)

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cigarettes and began to smoke L & M filter cigarettes, also made by Liggett. In response to a question as to why she switched to the L & M brand, Mrs. Cipollone stated that "[w]ell, they were talking about the filter tip, that it was milder and a miracle it would keep the stuff inside a trap, whatever." When asked why

(Cont'd)

you're wondering about cigarettes. Smoke Chesterfields—they're good.

5 J.A. 161 (Nov. 5, 1952).

[A] medical specialist is making . . . examinations . . . every two months. Now they're gone, I think, as far as 8 months. That's so far, 8 months. What they did was get a group of people from various walks of life. . . . And 45% of this group smoked Chesterfields for an average of over 10 years. After 8 months, the medical specialist reports he has observed no adverse effects whatever on the noses, the throat, the sinuses, the ears, or other organs from smoking Chesterfields.

That's—that seems to me to [mean] mildness, real mildness. You've been wondering about whether or not smoking does things to you which you don't want to do? Well, why don't you smoke Chesterfields. Here's a guy watchin' a lot of people and nothin' happened to them yet. We've been smokin 'em a long time. Of course, we were always this way.

You can't judge by us. But they're good, very fine, and I never recall seein' on anybody's gravestone—He Smoked Too Much, did you? I never did. So Chesterfield's for you, regular or king size.

5 J.A. 171 (Jan. 8, 1953).

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she desired the filter tip, she testified that "it was the new thing and I figured, well, go along [,and that] it was better [because t]he bad stuff would stay in the filter then." When asked whether concern about the "bad stuff" was due to a concern about her health, she stated "[n]ot really. . . . It was the trend. Everybody was smoking the filter cigarettes and I changed, too."

She also stated that although she could not remember any specific advertisements, she did "recall the ads and . . . remember the tips [and] the messages of a filter, a safer, something to that effect. . . . That it would filter the nicotine and the tar and the tobacco[, and t]hat it would be a cleaner and fresher smoke." Mrs. Cipollone also stated that she "recall[ed] seeing an ad that said doctors recommend you smoke . . . I think it was L & M's. . . . [T]hrough advertising, I was led to assume that they were safe and they wouldn't harm me. . . . There was lots of advertising. There was advertising everywhere. There was advertising in magazines, on billboards, in newspapers."

Mr. Cipollone also introduced evidence as to how the L & M brand was marketed during the years that Mrs. Cipollone smoked that brand. One series of advertisements that appeared on television and in magazines at the outset of L & M's introduction to the public stated that L & M "miracle tip" filters were "just what the doctor ordered!"; the "just what the doctor ordered" phrase often appeared in a large bold typescript in magazine advertisements as "remov[ing] the heavy particles, leaving you a Light and Mild smoke."

In 1968, Mrs. Cipollone stopped smoking the L & M brand and started smoking the Virginia Slims brand, manufactured by Philip Morris. She stated that she switched "because it was very glamorous and very attractive ads and it was a nice looking

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cigarette. That persuaded me." In the 1970's, Mrs. Cipollone switched to the Parliament brand, also manufactured by Philip Morris. She testified that this brand was advertised as having a "recessed" filter and that she thought that this made it healthier. In 1974, she changed from the Parliament to the True brand, a cigarette manufactured by Lorillard, Inc. ("Lorillard") and advertised as low tar, upon the advice of her doctor, who had told her son to stop smoking.

From 1942 until the early 1980's, Mrs. Cipollone smoked between one pack and two packs of cigarettes per day. The only exception to this pattern was that, at the urging of her husband, Mrs. Cipollone substantially reduced her smoking during her first pregnancy in the 1940's. In 1981, Mrs. Cipollone was diagnosed as having lung cancer, but even though her doctors advised her to stop smoking, she was unable to do so. Mrs. Cipollone continued to smoke until June of 1982 when her lung was removed. Even after that, she smoked occasionally, in secret. She testified that she was "addicted" to cigarette smoking and that it was terribly difficult for her to give it up. She stopped smoking in 1983 after her cancer had spread widely and she had become terminally ill. Mrs. Cipollone died on October 21, 1984.

Evidence was also introduced on the subject of Mrs. Cipollone's awareness of the health consequences of smoking cigarettes. Some of that evidence has already been alluded to: she switched to the L & M brand in part because she thought that brand safer than the Chesterfield brand, and she later switched to the Parliament and True brands out of concern for her health. In addition, from the beginning of the Cipollones' marriage in 1947, Mr. Cipollone repeatedly told his wife that she should stop smoking because it was unladylike and bad for her health. When reports linking smoking with cancer and heart disease began to



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appear in the media, Mr. Cipollone repeatedly brought them to his wife's attention. Other members of the Cipollone family also told her that cigarette smoking was dangerous to her health and could cause cancer. After January 1, 1966, every package of cigarettes purchased by Mrs. Cipollone bore the Congressionally mandated warning labels.

There is also evidence that Mrs. Cipollone feared that her cigarette smoking would damage her health. When she developed a bad cough, her concern about the possible effect of smoking on her health led her, apparently prior to 1966, to make novenas to Saint Jude asking his intercession on her behalf to prevent her from developing cancer. There is also evidence, however, that Mrs. Cipollone disbelieved the reports linking cigarette smoking to cancer and other health problems. As explained above, there is evidence that she read the cigarette companies' advertisements, understood them as representing that the cigarettes were safe, and thus, as she put it "was led to assume that [the cigarettes that I purchased] wouldn't harm me." She stated that she had often read cigarette company or Tobacco Institute statements, reported in articles about the health consequences of smoking or reproduced in advertisements, stating that the link between smoking and disease has not been proven. She also testified that because she found it so difficult to stop smoking, she "[m]aybe . . . didn't want to believe" the reports that she heard that smoking caused cancer or other diseases and that she "didn't believe" that her smoking would cause her to contract lung cancer. In addition, Mrs. Cipollone stated that she believed that "[t]obacco companies wouldn't do anything that was really going to kill you."

### III. PROCEDURAL HISTORY

On August 1, 1983, Mr. and Mrs. Cipollone filed a complaint

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in the district court for the District of New Jersey, founded on diversity of citizenship, seeking damages against Liggett, Philip Morris and Lorillard for the suffering and monetary losses resulting from Mrs. Cipollone's lung cancer. The complaint alleged that the lung cancer resulted from Mrs. Cipollone's smoking of cigarettes manufactured by the named defendants.

On May 31, 1985, following Mrs. Cipollone's death, and suing in his capacity as Mrs. Cipollone's executor and on his own behalf, Mr. Cipollone filed a third amended complaint, upon which the case was tried. The third amended complaint included damages claims against each defendant based on the following theories of liability:<sup>3</sup>

1. Strict liability in tort (and negligence) on the theory that the defendants' failed to warn adequately (or negligently failed to warn adequately) of the health effects of smoking ("the failure to warn claim");
2. Strict liability in tort on the theory that the defendants marketed defectively designed cigarettes rather than alternatively designed, safer cigarettes ("the design defect claim");
3. Strict liability in tort on the theory that the health risks of the defendants' cigarettes exceeded their social utility ("the generic risk-utility claim");
4. Breach of express warranty regarding the health effects of smoking ("the express warranty claim");

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3. The third amended complaint contained 14 counts; we have therefore summarized the salient points.



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5. Fraud and misrepresentation in the advertising and promotion of cigarettes from 1940 to 1983 ("the fraudulent misrepresentation claim");

6. Conspiracy to defraud the public regarding the health effects of smoking ("the conspiracy to defraud claim");

The defendants moved for summary judgment on the ground that the plaintiff's claims were preempted by the Federal Cigarette Labeling and Advertising Act, Pub.L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331-1340 (1982 & Supp. II 1984)), a statute enacted in 1965 in the wake of the Surgeon General's historic report on the hazards of cigarette smoking. The Act required health warnings, as set forth in the statute and subsequently strengthened by statutory amendments, to be placed on cigarette packages. The effective date of the statute was January 1, 1966. See Pub.L. No. 89-92, § 11, 79 Stat. at 284.

The district court held that the statute did not have preemptive effect, but certified the preemption question for interlocutory review by this court pursuant to 28 U.S.C. § 1292(b) (1982). We assumed jurisdiction over the appeal and concluded that the Act impliedly preempted some of the plaintiff's claims, holding as follows:

[T]he Act preempts those state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes. . . . [W]here the success of a state law damage claim necessarily depends on the assertion that a party bore the duty to provide a warning to consumers

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in addition to the warning Congress has required on cigarette packages, such claims are preempted as conflicting with the Act.

789 F.2d at 187 (footnote omitted). We remanded the case to the district court so that it might determine which claims were preempted.

The district court interpreted our decision as preempting the plaintiff's failure to warn, express warranty, fraudulent misrepresentation, and conspiracy to defraud claims to the extent that they sought to challenge the defendants' advertising, promotional and public relations activities after January 1, 1966. See 649 F.Supp. 664, 669, 673-75 (D.N.J.1986). Because Mrs. Cipollone did not smoke cigarettes manufactured by Philip Morris or Lorillard before January 1, 1966, the district court granted judgment on the pleadings on the failure to warn and express warranty claims as to those defendants. However, the district court held that the plaintiff's design defect and risk-utility claims were not preempted. See *id.* at 669-72.

In another pretrial ruling, the district court struck the plaintiff's generic risk-utility claim on the ground that it was barred through the retroactive application of the New Jersey Products Liability Act, 1987 N.J.Sess.Law Serv. ch. 197, 188-93 (West) (codified at N.J.S.A. §§ 2A:58C-1 to -7 (West 1987)). See Dist.Ct.Op. 1-6 (Oct. 27, 1987).

After five years of discovery and numerous pretrial motions, the case proceeded to trial on plaintiff's failure to warn, design defect, express warranty, fraudulent misrepresentation, and conspiracy claims, and on defendants' comparative fault and statute of limitations defenses. On April 21, 1988, at the close

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of plaintiff's proofs, the district court struck the design defect claim on the ground that plaintiff had failed to present sufficient evidence that defendants' failure to market an alternatively designed cigarette when it became feasible to do so in the mid-1970s was a proximate cause of Mrs. Cipollone's illness and death. *See* 683 F.Supp. 1487, 1493-95 (D.N.J.1988). This ruling has not been challenged on appeal.

As a result of the district court's rulings, jury deliberations were limited to the fraudulent misrepresentation claim against each defendant, the conspiracy to defraud claim against each defendant, the failure to warn claim against Liggett, and the express warranty claim against Liggett. The district court also took the defendants' statute of limitations defense from the jury by granting partial summary judgment for the plaintiff on this issue. *See* Dist.Ct.Op. (Dec. 21, 1987).

After a four-month trial, the jury deliberated for four and one half days and returned its verdict in the form of answers to special interrogatories. *See* Fed.R.Civ.P. 49(a). The interrogatories and the jury's answers are as follows:

1. Has plaintiff proven all of the elements necessary to establish fraudulent misrepresentation or concealment by defendant Liggett, prior to 1966, of material facts concerning significant health risks associated with cigarette smoking?

Yes  
No X

2. Has plaintiff proven all of the elements necessary to establish fraudulent misrepresentation by defendant Philip Morris, prior to 1966, of material facts concerning significant health risks

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associated with cigarette smoking?

Yes  
No X

3. Has plaintiff proven all of the elements necessary to establish fraudulent misrepresentation by defendant Lorillard, prior to 1966, of material facts concerning significant health risks associated with cigarette smoking?

Yes  
No X

4. Was there a conspiracy prior to 1966 to fraudulently misrepresent and/or conceal material facts concerning significant health risks associated with cigarette smoking?

Yes  
No X

5. If you answered "yes" to question #4, were any of the defendants members of that conspiracy?

Liggett Group, Inc.	Yes	No
Philip Morris Incorporated	Yes	No
Lorillard, Inc.	Yes	No

6. If you answered "yes" to question number 5, has plaintiff proven all of the elements necessary to establish fraudulent misrepresentation or concealment, prior to 1966, by any member of the conspiracy?

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Yes  
No

7. Should Liggett, prior to 1966, have warned consumers regarding health risks of smoking?

Yes X  
No

8. If you answered "yes" to question 7, was that failure to warn prior to 1966 a proximate cause of all or some of Mrs. Cipollone's smoking?

Yes X  
No

9. If you answered "yes" to question 8, was such smoking a proximate cause of Mrs. Cipollone's lung cancer and death?

Yes X  
No

10. If you answered "yes" to question 9, did Mrs. Cipollone voluntarily and unreasonably encounter a known danger by smoking cigarettes?

Yes X  
No

11. If you answered "yes" to question 10, was this conduct by Mrs. Cipollone a proximate cause of her lung cancer and death?

Yes X  
No

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12. If you answered "yes" to question 11, what is the percentage of responsibility for Mrs. Cipollone's injuries attributable to each of the following parties:

Mrs. Cipollone	80%
Liggett Group, Inc.	20%

[NOTE: The sum of these percentages must equal 100%].

13. Did Liggett make express warranties to consumers regarding the health aspects of its cigarettes?

Yes X  
No

14. If you answered "yes" to question 13, did any Liggett products used by Mrs. Cipollone breach that warranty?

Yes X  
No

15. If you answered "yes" to question 14, was Mrs. Cipollone's use of these products a proximate cause of her lung cancer and death?

Yes X  
No

16. If you answered "yes" to any of the following questions: 1, 2, 3, 6, 9 or 15, what damages did Mrs. Cipollone sustain?

\$ none



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17. If you answered "yes" to any of the following questions:  
1, 2, 3, 6, 9, or 15, what damages did Mr. Cipollone sustain?

\$400,000

18. If you answered "yes" to any of the following questions:  
1, 2, 3, 6, or 9, is plaintiff entitled to punitive damages against  
one or more of the defendants?

Yes

No X

19. If you answered "yes" to question 18, to what amount  
is plaintiff entitled?

\$

20. If you awarded a sum under question 19, what amount  
of this total is attributable to each of the following parties?

Liggett Group, Inc.	\$
Philip Morris Incorporated	\$
Lorillard, Inc.	\$

[NOTE: these amounts should add up to the total awarded  
under question 19.]

As the answers to the interrogatories indicate, the jury rejected  
the fraudulent misrepresentation claims and the conspiracy to  
defraud claims against all defendants. As to the failure to warn  
claim against Liggett, the jury concluded that Liggett breached  
its duty to warn of the health hazards of smoking before 1966,  
that this breach was a proximate cause of Mrs. Cipollone's

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smoking, and that Mrs. Cipollone's smoking was a proximate  
cause of her death. No damages were awarded on the failure to  
warn claim, however, because New Jersey's comparative fault law  
bars a plaintiff from recovering damages if she is more than 50%  
at fault for the injury, and the jury found that Mrs. Cipollone  
"voluntarily and unreasonably encounter[ed] a known danger by  
smoking cigarettes" and in so doing bore 80% of the responsibility  
for her injuries. As to the express warranty claim, the jury found  
that Liggett had breached an express warranty made to consumers.  
The jury awarded Mr. Cipollone \$400,000 to compensate him  
for damages that he sustained from Liggett's breach of warranty;  
the jury awarded Mrs. Cipollone's estate no damages on the breach  
of warranty claim.

On June 29, 1988, the plaintiff moved for a new trial on  
the limited issue of Mrs. Cipollone's damages and to amend the  
judgment to include prejudgment interest pursuant to New Jersey  
Rule 4:42-11(b). On July 1, 1988, Liggett moved for judgment  
n.o.v. and, in the alternative, for a new trial on account of alleged  
error in the district court's jury instructions on express warranty  
and its special interrogatories. On August 24, 1988, the district  
court denied all of the post-trial motions. See 693 F.Supp. 208  
(D.N.J.1988). The defendants and Mr. Cipollone filed timely  
notices of appeal.

In its appeal, Liggett contends that the district court made  
the following prejudicial errors in its jury instructions: (1) it failed  
to instruct the jury that Mrs. Cipollone's nonreliance on the Liggett  
advertisements would preclude her recovery on the express  
warranty claim; (2) it failed to instruct the jury that a buyer's  
actual knowledge of a warranty-breaching condition bars recovery  
on an express warranty claim under the doctrine of assumption  
of risk or contributory fault; and (3) it erroneously instructed



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the jury in several respects on the failure to warn claim, most significantly by failing to impose a but-for causation requirement.

Liggett also contends that the district court erred in failing to grant its motion for judgment n.o.v. on the express warranty claim on the grounds that (1) the jury's finding that Mrs. Cipollone "voluntarily and unreasonably encounter[ed] a known danger by smoking cigarettes" established lack of proximate causation as a matter of law; (2) the plaintiff offered no evidence that Mrs. Cipollone's lung cancer was proximately caused by any claimed breach of express warranty; and (3) the evidence cannot support a finding that any Liggett advertisement made a warranty covering health effects in the future from forty years of smoking. Liggett also contends that the district court erred by granting plaintiff partial summary judgment on defendant's affirmative defenses based on the statute of limitations.

In his appeal, Mr. Cipollone contends that (1) the district court's jury charge and interrogatories on the failure to warn issue erroneously and unfairly allowed the jury to consider Mrs. Cipollone's post-1965 smoking in determining her percentage of comparative fault; (2) the district court erred in applying the New Jersey Products Liability Act to strike the risk-utility claim; (3) the district court's refusal to award prejudgment interest contravenes New Jersey Court Rule 4:42-11(b); and (4) the district court erred in applying our preemption decision to the intentional tort claims (i.e. the fraudulent misrepresentation and conspiracy to defraud claims). Mr. Cipollone also announced that if the verdict in his favor on the breach of express warranty claim and his contention that he is entitled to prejudgment interest were upheld, he would not press his other contentions.

In its protective cross-appeal, Philip Morris contends that

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Mr. Cipollone's intentional tort claims are preempted, and that, in any event, these claims are mooted by the jury's findings. In its protective cross-appeal, Lorillard asserts that, in view of Mr. Cipollone's concession that he would be satisfied to accept the breach of express warranty verdict plus prejudgment interest, our assumption of jurisdiction over Mr. Cipollone's appeal relative to the claims against it and Philip Morris would violate the "case or controversy" requirement of Article III of the United States Constitution.<sup>4</sup> Lorillard also contends that the intentional tort claims are preempted by the Labeling Act.

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4. We find this contention to be without even colorable merit and dispose of it summarily. Unlike the plaintiffs in *Granfield v. Catholic University of America*, 530 F.2d 1035 (D.C.Cir.), cert. denied, 429 U.S. 821, 97 S.Ct. 68, 50 L.Ed.2d 81 (1976), we think that there is no question regarding Mr. Cipollone's "wholehearted contrariety," 530 F.2d at 1045, to the defendants' position. Neither do we find applicable the mootness concerns motivating the decision in *In re Coordinated Pretrial Proceedings in Petroleum Products, Antitrust Litigation*, 830 F.2d 198 (Emerg.Ct.App.), cert. denied, 484 U.S. 969, 108 S.Ct. 466, 98 L.Ed.2d 405 (1987). In *Petroleum Products*, a pending decision before the Ninth Circuit—over which the Emergency Court of Appeals had no control—might have mooted, as a matter of law, the proceedings before, or decision of, that court. See *id.* at 202-04. Here, by contrast, we address the intentional tort claims simultaneously with our rejection of Mr. Cipollone's position on the express warranty claim. Thus, we have no reason to believe that Mr. Cipollone's position lacks, or will lack, "wholehearted contrariety" to Lorillard's on the intentional tort claims. Moreover, the fact that plaintiff is willing to settle for less than he might get does not mean that his position is not contrary to the defendants. For all of these reasons, we have no problem finding a case or controversy under Article III.

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IV. SHOULD MRS. CIPOLLONE'S POST-1965 CONDUCT HAVE BEEN CONSIDERED IN DECIDING HER COMPARATIVE FAULT ON THE FAILURE TO WARN CLAIM?<sup>5</sup>

The New Jersey Comparative Fault Act, N.J.S.A. 2A:15-5.1, states that:

Contributory negligence shall not bar recovery in an action by any person . . . to recover damages for negligence resulting in death or injury to person or property, if such negligence was not greater than the negligence of the person against whom recovery is sought . . . . Any damages sustained shall be diminished by the percentage sustained of negligence attributable to the person recovering.

The Comparative Fault Act can apply to strict liability actions if the plaintiff's conduct can be found to constitute contributory negligence. See *Suter v. San Angelo Foundry & Machine Co.*, 81 N.J. 150, 164, 406 A.2d 140, 147 (1979). Thus, if Mrs. Cipollone were more than 50% responsible for her own smoking, as the jury found her to be, plaintiff would be barred from recovering under his failure to warn claim. As we have noted, the interplay between New Jersey's comparative fault scheme and the preemptive effect of the Labeling Act produced an anomalous situation at trial. The district court did not distinguish between Mrs. Cipollone's pre-1966 and post-1965 conduct when instructing the jury to consider the degree to which she was at fault pursuant to New

5. Although Mr. Cipollone was prepared to forego pursuit of this claim in the event that his breach of express warranty verdict was upheld, that has not happened. See *infra* Part VI.

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Jersey comparative fault law.<sup>6</sup>

The wording of special verdict interrogatories 10, 11, and 12 was to the same effect,<sup>7</sup> permitting the jury to consider Mrs.

6. The district court instructed the jury as follows:

Defendant, Liggett, has the burden to prove by a preponderance of the believable evidence that Rose Cipollone had a complete understanding and appreciation of the nature and extent of the health risks of cigarette smoking, and further that her use of cigarettes was voluntary and unreasonable. . . .

In determining whether Rose Cipollone should be held responsible for her injuries, you must consider the cigarettes which Rose Cipollone smoked and the health risks which they have alleged to have. If you have determined that the use of those cigarettes involved any significant health risk, you must then decide whether Rose Cipollone had knowledge and appreciation of those risks and, having such knowledge and appreciation, voluntarily and unreasonably proceeded to encounter those risks by smoking cigarettes and by failing to quit smoking. . . .

If you decide that by continuing to smoke Rose Cipollone voluntarily and unreasonably encountered a known risk, you must then decide whether that conduct was a proximate cause of Rose Cipollone's injuries. However, if you find that she did not do so voluntarily or acted reasonably then defendants have not met their burden as to this defense.

2 J.A. 108-10.

7. Interrogatory 10 asked whether "Mrs. Cipollone voluntarily and unreasonably encounter[ed] a known danger by smoking cigarettes." Interrogatory 11 asked whether "this conduct by Mrs. Cipollone [was] a proximate cause of her lung cancer and death." Interrogatory 12 asked the jury to apportion responsibility between Mrs. Cipollone and Liggett based upon its answers to the preceding questions 10 and 11. See *supra* at 554.



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Cipollone's fault to the extent it believed that she acted unreasonably in continuing to smoke after 1965. However, the court instructed the jury not to consider Liggett's post-1965 conduct. Mr. Cipollone contends that the jury instructions were inconsistent with *Ostrowski v. Azzara*, 111 N.J. 429, 545 A.2d 148 (1988), in which the New Jersey Supreme Court held that once a legal wrong has occurred, plaintiff's conduct after that time bears only on mitigation of damages (even if some of plaintiff's injuries have not yet manifested themselves). Such conduct does not, however, bear on whether plaintiff's comparative fault falls above or below the 50% threshold.

Mr. Cipollone also contends that the district court's jury instructions were asymmetrical and unfair because they permitted the jury to use Mrs. Cipollone's post-1965 conduct to bar her claim even though the post-1965 marketing practices of the defendant were free from scrutiny. He points out that the jury was required to bar Mrs. Cipollone's failure to warn claim in its entirety if it believed that she was 80% responsible for her injury in light of her smoking from 1942 to 1983 even if it believed that Liggett's failure to warn was, for example, 67% responsible for Mrs. Cipollone's smoking from 1942 to 1966.

Because the facts and reasoning of *Ostrowski* are so important to our resolution of the issue of Mrs. Cipollone's post-1965 conduct, we recount them in some detail. Mrs. Ostrowski was a patient whose diabetes, poor diet, and cigarette smoking caused her to have severe blood circulation problems. She went to her podiatrist to complain of soreness in her left toe. After several visits, and after considering her representation (which proved to be false) that she had seen her internist regarding her diet and insulin dosage, the podiatrist recommended that the toe nail on the sore toe be removed to allow drainage. After the surgery,

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the plaintiff continued to smoke, despite advice that she should stop (because smoking greatly increases the blood circulation problems caused by diabetes). Several weeks after the surgery, it became clear that the blood flow to the toe was insufficient to heal the toe; the plaintiff was left with a non-healing, pre-gangrenous wound. Mrs. Ostrowski had to undergo three different by-pass surgeries to increase blood circulation to the toe. The last operation involved a vein transplant from one leg to another.

Mrs. Ostrowski sued the podiatrist, contending that the podiatrist was negligent in her initial decision to remove the toe nail, that the toe nail should not have been removed, and that her subsequent problems with her leg were proximately caused by the podiatrist's negligence. The podiatrist contended that the plaintiff was at fault in both her pre-surgery and post-surgery conduct and that this conduct contributed to her injuries. The jury found that the podiatrist had acted negligently in removing the plaintiff's toenail but found that plaintiff's fault, based on both her pre- and post-surgery conduct, exceeded that of the podiatrist (51% to 49%). The plaintiff's recovery was therefore barred by the trial court under New Jersey comparative fault law because her fault exceeded 50%.

The Appellate Division of the Superior Court affirmed, but the Supreme Court of New Jersey reversed. Because the podiatrist's negligence was in performing the toe surgery, the Court conceptualized the plaintiff's behavior after treatment had begun but before the toe surgery as relevant to comparative fault. However, the Court concluded that her post-surgery behavior was relevant only to avoidable consequences.<sup>8</sup> On remand, the jury

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8. Avoidable consequences is the name given to the damage that plaintiff causes to herself by breaching her duty to mitigate damages.



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was instructed to arrive at two percentage figures regarding plaintiff's conduct: first, the degree to which her conduct after treatment had begun was responsible for the toe surgery, and second, the degree to which her conduct after treatment had begun—considering her conduct both before and after the toe surgery—was responsible for her ultimate injury, the bypass surgery. If the first percentage (the plaintiff's fault for the toe surgery) was less than the physician's fault for the toe surgery, the plaintiff would recover. Her recovery, however, would be offset by the second percentage times the damages suffered (which reflects plaintiff's total responsibility for her ultimate injury).<sup>9</sup> If the first percentage was greater than the physician's fault for the surgery, plaintiff's recovery would be barred by the Comparative Fault Act.

The Court distinguished between the plaintiff's conduct before and after the toe surgery on the ground that "[a]voidable consequences . . . come[ ] into action: when the injured party's carelessness occurs *after* the defendant's legal wrong has been committed" but "[c]ontributory negligence . . . comes into action when the injured party's carelessness occurs *before* defendant's wrong has been committed or concurrently with it." 111 N.J. at

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9. An example may help to clarify. Suppose the jury finds that the plaintiff suffered \$100,000 in damages from the bypass surgery. Suppose also the jury finds that, after plaintiff had begun treatment with the podiatrist, her conduct before the toe surgery was 10% responsible for her ultimate injury (the first percentage), but that her conduct before and after the toe surgery combined were 80% responsible (the second percentage). Thus the podiatrist's conduct (before the toe surgery) must have been 20% responsible for the ultimate injury. On these facts, even though the plaintiff's total conduct was more responsible for her injury than the podiatrist's (80% versus 20%), she would recover, because her conduct *before the toe surgery* was less responsible for her ultimate injury than the podiatrist's conduct during that time (10% versus 20%). However, her ultimate recovery would be only \$20,000 (because the podiatrist was only 20% responsible for the ultimate injury).

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438, 545 A.2d at 152.<sup>10</sup> In explaining why it thought that the jury should arrive at two percentages to measure plaintiff's fault, the Court reasoned that "it would be the bitterest irony if the rule of comparative negligence, designed to ameliorate the harshness of contributory negligence, should serve to shut out any recovery to one who would otherwise have recovered under the law of contributory negligence [because her contributory conduct was relevant to avoidable consequences rather than contributory negligence]." *Id.* at 441-42, 545 A.2d at 154.

The court held that the plaintiff's conduct before treatment had begun was irrelevant to both the comparative fault and avoidable consequence injuries, under the doctrine that the "defendant 'must take the plaintiff as he finds him.'" *Id.* at 438, 545 A.2d at 152 (citation omitted). Nevertheless, the Court made clear that the plaintiff's conduct before treatment had begun was not totally irrelevant to the case: that conduct was relevant to determining what damages were a proximate result of the defendant's negligence, because, as we have noted, some of the damage to the plaintiff's leg could have been caused not by the defendant's negligence but by the plaintiff's pre-treatment condition. *See id.* at 448, 545 A.2d at 157.<sup>11</sup>

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10. The Court noted, however, that this timeline approach to dividing the plaintiff's conduct into that relevant to contributory fault and that relevant to avoidable consequences will not work in every case. *See* 111 N.J. at 438 n. 2, 545 A.2d at 152 n. 2 (citing *Waterson v. General Motors Corp.*, 111 N.J. 238, 544 A.2d 357 (1988), which found that failure to use a seat belt, although not a cause of the automobile accident that resulted in injury, was a cause of avoidable consequences).

11. The Court also noted that "it is often difficult to determine how much of the plaintiff's injury is due to the preexisting condition and how much the

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We agree with Mr. Cipollone's contention that it is appropriate to conceptualize our preemption decision as imposing an automatic cut-off date for imposition of liability. We further agree with Mr. Cipollone that, in light of the preemption decision, the doctrines set out in *Ostrowski* should have been applied in this case. As Liggett emphasizes throughout its brief, its post-1965 marketing practices could not form the basis for any tort or warranty claim as a matter of law; hence, Liggett's arguably tortious conduct was completed as of January 1, 1966. Therefore, Mrs. Cipollone's post-1965 conduct should have been considered as relevant to avoidable consequences, possibly reducing her damages but not foreclosing liability.

We reject Liggett's contention that "application of plaintiff's interpretation of *Ostrowski* would require this court to hold that the case overruled the New Jersey Supreme Court's [product liability] decisions in *Suter v. San Angelo Foundry & Machine Co.*, 81 N.J. 150, 406 A.2d 140 (1979); *Maiorino v. Weco Products Co.*, 45 N.J. 570, 214 A.2d 18 (1965) and *Cintrone v. Hertz Truck Leasing*, 45 N.J. 434, 212 A.2d 769 (1965)." Liggett's Br. at 43 n. 50. Liggett's argument apparently is that the instant case is no different from the typical toxic tort case in which there may be a significant interval between the time of defendant's wrongful act (the sale of or exposure to the defective product) and the time plaintiff's injury from use of the product manifests itself. Therefore, according to Liggett, all of the plaintiff's pre-injury conduct should bear on comparative fault. Our preemption decision renders this analogy inapposite, however. In the more

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aggravation is caused by the defendant" and that the defendant should bear the burden of separating the two so that any damage not separable is borne by the defendant. 111 N.J. at 439, 545 A.2d at 152.

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typical case, the jury considers all of the defendant's pre-injury conduct also. Because that cannot happen here, we find it unfair and impermissible for the jury to consider Mrs. Cipollone's comparative fault during the period (1966-1981) for which Liggett's conduct is unjudgable.

We have no way of knowing how much of the 80% fault that the jury ascribed to Mrs. Cipollone is attributable to her pre-1966 smoking and how much to her post-1965 smoking. The judgment entered on the jury verdict in Liggett's favor on the failure to warn claim must therefore be reversed (the error is obviously not harmless) and the case remanded for new trial on that issue.

We do not dispute Liggett's contention that we could analyze the case differently. However, we believe that the artificial cut-off so skews the normal balance that only the *Ostrowski* avoidable consequences analysis can mitigate the unfairness and disruption to state tort law wrought by our preemption decision. We acknowledge that the retrial must proceed, to some extent, with an artificial distinction between conduct before and after January 1, 1966, and that the expert witnesses will face a difficult task on allocating the consequence of pre-1966 and post-1965 conduct. However, that result is forced upon us by the circumstances. This will not be the first time, nor the last, that a legal construct will have constrained a trial. We are confident that the extremely able lawyers and the distinguished trial judge in whose hands this case rests will do justice.

On retrial, the jury should be asked whether Liggett's pre-1966



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failure to warn caused Mrs. Cipollone to smoke cigarettes.<sup>12</sup> The jury must consider the relative degrees to which Mrs. Cipollone and Liggett were at fault for Mrs. Cipollone's pre-1966 smoking. If Mrs. Cipollone is thought to have been more than 50% at fault than Liggett for her pre-1966 smoking, then the failure to warn claim ends there, and Mrs. Cipollone's recovery is barred on that claim. If, however, the jury finds that Mrs. Cipollone's pre-1966 fault for her smoking is 50% or less (and that that smoking was a proximate cause of her cancer), the jury must then consider the issue of avoidable consequences, considering Mrs. Cipollone's conduct both before and after January 1, 1966. The jury may not evaluate the propriety of the defendant's cigarette marketing practices after 1965, because the defendants have been absolved from liability for otherwise tortious and unfair marketing practices by the Labeling Act.

#### V. DID THE DISTRICT COURT OTHERWISE ERR IN INSTRUCTING THE JURY ON THE FAILURE TO WARN CLAIM?

Liggett contests several facets of the district court's jury charge on the failure to warn claim. Had the verdict on the failure to warn claim not been set aside on the grounds set forth in Part IV, we would have had to address these arguments in connection with Liggett's contention that the jury's answers to interrogatories 7, 8 and 9, in which it found that Liggett's failure to warn was a proximate cause of Mrs. Cipollone's injuries, should be set aside. We nonetheless discuss most of these issues because they are

12. As is indicated by the jury's answer to special interrogatory number 7, Liggett owed a duty to warn consumers of the health effects of smoking prior to 1966. This issue should not be re-tried; the existence of this duty has been properly established. See *infra* at 560.

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important for a proper retrial.

First, Liggett contends that it was under no duty to warn of the dangers of cigarettes because their dangers were commonly understood. We find that there is no basis for so holding as a matter of law, and that as a matter of fact the jury found otherwise.<sup>13</sup>

Liggett next argues that (1) the district court erred in instructing the jury on Liggett's duty to disclose the results of its scientific tests and (2) the district court's use of the word "obviousness" confused the jury. We find both of these contentions to be without merit. Under New Jersey law, Liggett had a duty to conduct research, and to disclose significant dangers discovered as a result of that research. See *Feldman v. Lederle Laboratories*, 97 N.J. 429, 453-55, 479 A.2d 374, 386-88 (1984). Moreover, there was nothing confusing about the district court's use of the word "obvious." The jury had no reason to think that it might be deciding an "open and obvious" danger case, see, e.g., *Shaffer v. AMF, Inc.*, 842 F.2d 893 (6th Cir.1988), and therefore it could not have been prejudicially confused.<sup>14</sup>

13. The district court's charge instructed the jury to:

consider the extent to which ordinary consumers prior to 1966 were aware that cigarette smoking posed significant health risks. . . . The obviousness of a product's danger—as measured by such general consumer knowledge, not by a particular plaintiff's knowledge—is one element to be considered in order for you to determine whether a duty to warn exists.

2 J.A. 105-06.

14. Liggett also contends that the factors listed by the district court as relevant to determining whether a duty to warn exists were superfluous and prejudicial. We find this argument to be frivolous.



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Liggett's more substantial contention has to do with the district court's instruction on causation, which defines proximate cause<sup>15</sup> as follows:

a cause which necessarily set the other causes in motion and was a substantial contributing factor in bringing about the injury. Proximate cause is defined as a cause which naturally and probably led to and might have been expected to produce the result complained of.

2 J.A. 91-92. The district court also instructed the jury that "there may be two or more concurrent and directly cooperative and efficient proximate causes of an injury" if the defendant was "a substantial contributing factor" in the plaintiff's injuries. 2 J.A. 93.

It is not exactly clear what fault Liggett finds with this instruction. Liggett claims that: "Plaintiff was required to prove that 'but for' Liggett's claimed failure to warn Mrs. Cipollone would not have been injured—that had Liggett provided a warning prior to 1966 Mrs. Cipollone would have quit smoking or never started smoking, and by doing so, Mrs. Cipollone would have avoided lung cancer in 1981." Liggett Br. at 50. There are three possible interpretations of Liggett's objection.

First, Liggett may be arguing that, even if plaintiff proves by a preponderance of the evidence that the totality of Liggett's

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15. As the district court carefully instructed, this case involves two distinct causal inquiries: first, whether Liggett's violation of legal norms caused Mrs. Cipollone to smoke, and second, whether the cigarettes that Mrs. Cipollone smoked as a result of Liggett's violations proximately caused her cancer.

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violation of legal norms—its failure to warn and breach of warranty—was a "but for" cause of Mrs. Cipollone's lung cancer, the jury could not find for the plaintiff with respect to any individual Liggett violation unless the plaintiff demonstrated by a preponderance of the evidence that that individual violation caused Mrs. Cipollone's lung cancer. This bifurcation of Mr. Cipollone's lawsuit into two independent claims might allow Liggett to escape liability for the totality of its wrongful conduct. We find this argument untenable.

As a substantive matter, Liggett is liable if its behavior proximately caused Mrs. Cipollone's cancer. For pleading purposes, Mr. Cipollone divided Liggett's conduct up into different pre-established legal categories, i.e. a tort-based failure to warn claim and a contract-based express warranty claim. Although the elements of proof necessary to prove liability under these two legal theories differ, the procedural pleading and proof requirements do not transform Mr. Cipollone's allegations into two completely different lawsuits. Thus, Mr. Cipollone does not have to prove that each legal violation proximately caused his wife's cancer. He need only prove that the totality of Liggett's wrongful behavior, which as doctrinal matter is divided into a tort and contract claim, proximately caused her cancer.

Second, Liggett may be arguing that Mrs. Cipollone's conduct would have caused her cancer no matter what Liggett did, and that therefore Liggett's conduct cannot be considered the cause of Mrs. Cipollone's injury. This argument is plainly inconsistent with the established jurisprudence of concurrent causation. The "substantial factor" test has traditionally been used in concurrent cause cases, i.e. cases in which there are two or more causes each

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of which is sufficient to cause the injury.<sup>16</sup> See Keeton et al., *Prosser and Keeton on The Law of Torts* 266-68 (5th ed. 1984). Our preemption decision makes this case quite comparable to a concurrent cause situation. Liggett's pre-1966 behavior might have been enough, by itself, to cause Mrs. Cipollone's cancer, and its post-1965 behavior might also have been enough to cause the cancer. Thus, just as it is unfair to let one tortfeasor completely escape liability for his fire merely because another tortfeasor caused another fire, so it is unfair to let Liggett completely escape liability for its pre-1966 behavior merely because its post-1965 behavior (or that of its codefendants), which was immunized from scrutiny at the trial, might also have caused enough damage, by itself, to kill her.

Third, Liggett may be arguing that Mr. Cipollone had to prove, to a greater certainty than the district court's instruction required, that Liggett's failure to warn caused her injuries. Under this theory, the fact that the defendant's conduct might have been a substantial factor in causing Mrs. Cipollone's cancer would not be enough; rather, Mr. Cipollone would have had to prove, by a preponderance of the evidence, that if Liggett had not breached its warranty and if it had warned consumers of the dangers of smoking, Mrs. Cipollone would not have contracted cancer. In other words, Liggett argues that plaintiff had to prove that "but

16. For example, two fires merge and the combined fire destroys the plaintiff's property, although either fire would have done so alone. See *Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry.*, 146 Minn. 430, 179 N.W. 45 (1920). In such a case, one has to assign responsibility to either fire or no liability would be assigned because each defendant could prove, individually, that plaintiff's property would have been destroyed even if he had acted non-tortiously. Thus, liability is assigned even though each defendant's conduct could be seen as irrelevant to the ultimate outcome.

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for" Liggett's conduct, the injury would not have occurred.<sup>17</sup> We find this argument to be inconsistent with New Jersey law.

Liggett cites *Campos v. Firestone Tire and Rubber Co.*, 98 N.J. 198, 485 A.2d 305 (1984), which it claims rejected the substantial factor test and instead require a "but for" test in failure to warn situations. In *Campos*, the New Jersey Supreme Court

17. Some decisions and commentators have used statistics to elaborate on the meaning of "but for" causation, see, e.g., *In re Agent Orange Prod. Liab. Litig.*, 597 F.Supp. 740, 833-42 (E.D.N.Y. 1984), Orloff, *Theories of Cancer and Rules of Causation*, 27 *Jurimetrics* 255 (Spring 1987). This approach defines "but for" causation as at least a 50% chance that the defendant's conduct caused the injury in question. It is not clear to us that this is the instruction that Liggett is requesting. Nor is it clear to us that this is the only way to define "but for" causation. The leading hornbook on Torts states that "[the] question of [causation in] 'fact' is one upon which all the learning, literature and lore of the law are largely lost. It is a matter upon which lay opinion is quite as competent as that of the most experienced court. For that reason, in the ordinary case, it is peculiarly a question for the jury." Keeton, et al., *Prosser and Keeton on The Law of Torts* 264-65 (5th ed. 1984). By seeking to define causation more numerically (i.e., at least 50% probability), the statistics-oriented commentators may be advocating a substantive change that New Jersey would not endorse. We are not convinced that when a jury determines that "but for" a defendant's conduct, the injury would not have occurred, it is determining that the chances of that injury being the result of defendant's conduct are 50% or greater. Traditionally, jury instructions have been in words, not numbers. *Prosser and Keeton* seems to suggest that a jury's determination of causation defies numerical analysis, and New Jersey may want to keep it that way. Thus, with some trepidation, but with considerable support, we offer the following discussion of causation without an airtight definition of what "but for" causation is. For purposes of the discussion, it is sufficient that the reader recognize that a "but for" test requires more direct linkage between defendant's conduct and the injury than does the "substantial factor" instruction given by the district court. See also Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 *U.Chi.L.Rev.* 69, 84-91 (1975).



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found that the plaintiff had the burden of proving that a proper warning would have prevented the injury caused by a tire assembly explosion. The plaintiff was arguably aware of the need to protect himself by keeping the tire in a safety cage, but he reached into the cage and was injured when the assembly exploded. The court quoted with approval from an article by Dean Keeton:

If the basis for recovery under strict liability is inadequacy of warnings or instruction about dangers, then plaintiff would be required to show that an adequate warning or instruction would have prevented the harm.<sup>18</sup>

However, the court in *Campos* did not reverse the jury's verdict for the plaintiff. Instead, it remanded noting that "there may be some question whether plaintiff sustained his burden of proving causation, see *Brown v. United States Stove Co.*, [98 N.J. 155, 484 A.2d 1234 (1984)]." *Campos*, 98 N.J. at 211, 485 A.2d at 312. *Brown* seems to endorse a substantial factor test: "a tortfeasor will be held answerable if its 'negligent conduct was a substantial factor in bringing about the injuries.'" *Brown*, 98 N.J. at 171, 484 A.2d at 1243 (citations omitted). Thus, although the language quoted from Deen Keeton's article in *Campos* suggests that New Jersey might endorse a "but for" test in failure to warn cases, the citation to *Brown* indicates to the contrary. Subsequent New Jersey cases interpreting *Campos* also indicate to the contrary.

In *Hull v. Getty Refining & Marketing Co.*, 202 N.J.Super.

18. Keeton, *Products Liability—Inadequacy of Information*, 48 Tex.L.Rev. 398, 414 (1979).

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461, 467, 495 A.2d 445, 448 (App.Div.1985), and *Vallillo v. Muskin Corp.*, 212 N.J.Super. 155, 159-60, 514 A.2d 528, 530 (App.Div.1986), the New Jersey Superior Court cited *Campos* to support a substantial factor test. Determining proximate causation requires determining "whether [the] breach of a duty enforceable within strict product liability against any defendant constituted a substantial factor in the causation of plaintiff's accident." *Hull*, 202 N.J.Super. at 467, 495 A.2d at 448. Describing why it was overturning a plaintiff's verdict (not remanding, as the court did in *Campos* "[a] jury could have determined that the lack of a proper warning to rely on the cage's protection and to keep his arm out of the cage was at least a factor materially contributing to the happening of the accident." 212 N.J.Super. at 160, 514 A.2d at 530. In the case at bar, a jury could determine that Liggett's violations constituted a factor materially contributing to her injury.

New Jersey has also used the substantial factor test in nonfeasance situations. In *Evers v. Dollinger*, 95 N.J. 399, 471 A.2d 405 (1984), the New Jersey Supreme Court held that it was error to enter judgment for a doctor who failed to operate on a tumor for seven months. The court reasoned that, although the doctor's conduct did not cause the cancer, the seven-month delay could have been a substantial factor in causing the condition from which the plaintiff eventually suffered. In *Hake v. Manchester Township*, 98 N.J. 302, 486 A.2d 836 (1985), the same court held that plaintiff could establish causation in a wrongful death action by showing that defendant's negligent conduct negated a substantial possibility that plaintiff might have been saved after attempting to kill himself. Neither of these was a concurrent causation case and in neither case would defendant's conduct by itself have caused the injury. Yet, each defendant's conduct substantially increased the probability of the plaintiff's



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injury. In such situations the New Jersey courts have allowed recovery.

In light of these cases, we conclude that the district court did not erroneously instruct the jury as to the proximate cause requirement in Mr. Cipollone's failure to warn claim. The district court should again give a "substantial factor" charge on retrial.<sup>19</sup>

VI. DID THE DISTRICT COURT ERR IN FAILING TO INSTRUCT THE JURY THAT MRS. CIPOLLONE'S NONRELIANCE ON LIGGETT'S SAFETY ADVERTISEMENTS WOULD PREVENT HER FROM RECOVERING ON HER EXPRESS WARRANTY CLAIM?

We turn now to another major area of dispute between the parties, one that implicates the conceptual basis of express warranty law. Mr. Cipollone brought his express warranty claim under U.C.C. § 2-313(1), which provides:

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19. We note that, notwithstanding our preemption decision, if plaintiff argues an addiction theory, a jury might be able to consider Mrs. Cipollone's post-1965 smoking as well as her pre-1966 smoking for purposes of determining whether Liggett's tortious conduct caused Mrs. Cipollone's injury. If the jury believes that Liggett's pre-1966 conduct proximately caused Mrs. Cipollone to smoke cigarettes pre-1966 and that Mrs. Cipollone became addicted as a result of that smoking, then those post-1965 cigarettes smoked as a result of the addiction should be considered in discerning whether Liggett's conduct proximately caused Mrs. Cipollone's lung cancer. The Surgeon General has recently concluded that "[s]cientists in the field of drug addiction now agree that nicotine, the principal pharmacologic agent that is common to all forms of tobacco, is a powerfully addicting drug." U.S. Dep't Health & Human Serv., *The Health Consequences of Smoking: Nicotine Addiction—A Report of the Surgeon General* (1988)—.

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(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes *part of the basis of the bargain* creates an express warranty that the goods shall conform to the affirmation or promise. (b) Any description of the goods which is made *part of the basis of the bargain* creates an express warranty that the goods shall conform to the description.

N.J.S.A. § 12A:2-313(1) (emphases added). With respect to this issue, the district court gave the following instructions to the jury:

[P]laintiff must prove . . . that Liggett, prior to 1966, made one or more of the statements claimed by the plaintiff and that such statements were affirmations of fact or promises by Liggett . . . [and] that such statements were part of the basis of the bargain between Liggett and consumers like Rose Cipollone . . . .

The law does not require plaintiff to show that Rose Cipollone specifically relied on Liggett's warranties.

Ordinarily a guarantee or promise in an advertisement or other description of the goods becomes part of the basis of the bargain if it would naturally induce the purchase of the product and no particular reliance by the buyer on such statement needs to be shown. However, if the

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evidence establishes that the claimed statement cannot fairly be viewed as entering into the bargain, that is, that the statement would not naturally induce the purchase of a product, then no express warranty has been created.

4 J.A. at 232-34.

Liggett contends that this interpretation of "part of the basis of the bargain" is flawed because the jury should also have been instructed that Mrs. Cipollone's nonreliance on the advertisements would preclude those advertisements from becoming "part of the basis of the bargain." Liggett argues that the express warranty verdict must therefore be set aside. Although our interpretation of the precise meaning of "reliance" differs somewhat from Liggett's, we agree.<sup>20</sup>

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20. Initially, we emphasize that a representation made by a seller is not an express warranty if it is made in such a manner that both the seller and the buyer should understand to be a representation upon which the buyer will not rely. "[A]ll descriptions by merchants must be read against the applicable trade usages. . . ." N.J.S.A. § 12A:2-313 U.C.C. Comment 5. A representation made in a manner that is generally recognized not to be a basis upon which purchasers make a decision to purchase goods cannot be a warranty when read against "applicable trade usages." This requirement is in accord with the traditional common law "puffing" exception in the law of contracts. See H. Hunter, *Modern Law of Contracts: Breach and Remedies* ¶4.02[3], at 4-7 to 4-8 (1986 & Supp.1989). But Liggett has not contended, and we do not think it could, that its advertisements to consumers are generally recognized as not forming the basis upon which cigarette purchasing decisions are made. If such were the case, Liggett would not have spent millions of dollars on advertising.

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Authority on the question whether reliance is a necessary element of section 2-313 is divided. Although a few courts have held that reliance is not a necessary element of section 2-313,<sup>21</sup> the more common view has been that it is, and that either a buyer must prove reliance in order to recover on an express warranty or the seller must be permitted to rebut a presumption of reliance in order to preclude recovery.<sup>22</sup> Some treatise writers support this interpretation.<sup>23</sup> No New Jersey court or panel of this court has squarely addressed the question.<sup>24</sup>

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21. See, e.g., *Winston Indus., Inc. v. Stuyvesant Ins. Co.*, 317 So.2d 493 (Civ.App.Ala.) (purchaser permitted to sue under § 2-313 for breach of a warranty that he never received), *cert. denied*, 294 Ala. 775, 317 So.2d 500 (1975).

22. See, e.g., *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1101 (11th Cir. 1983) ("Absence of reliance will negate the existence of an express warranty."); *Scaringe v. Holstein*, 103 A.D.2d 880, 477 N.Y.S.2d 903 (1984) (notice that shift did not work demonstrated that plaintiff could not have relied on an alleged warranty that the used car was in "excellent condition"); *Indust-Ri-Chem Lab., Inc. v. Par-Pak Co.*, 602 S.W.2d 282, 293 (Tex.Ct.App.1980) ("Obviously, if the buyer knows that a representation of the seller is untrue, that representation cannot be a part of the basis of the bargain.").

23. See, e.g., 1 J. White & R. Summers, *Uniform Commercial Code* § 9-5, at 448, 455 (3d ed. 1988); W. Hawkland, *Uniform Commercial Code Series* § 2-313:05, at 299-300 (1983 & Supp.1987). Professor White has written an amicus brief on this issue, consistent with his treatise position, on behalf of Lorillard, Philip Morris, R.J. Reynolds, American Tobacco Co. and Brown & Williamson Tobacco Co.

24. In their briefs, the parties discuss five New Jersey and Third Circuit cases: *Jackson v. Muhlenberg Hospital*, 96 N.J.Super. 314, 232 A.2d 879 (Law  
(Cont'd)

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The history of section 2-313(1)(a), although informative, fails

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Div.1967), *rev'd on other grounds*, 53 N.J. 138, 249 A.2d 65 (1969) (per curiam); *Collins v. Uniroyal, Inc.*, 126 N.J.Super. 401, 315 A.2d 30 (App. Div.1973) (per curiam), *aff'd*, 64 N.J. 260, 315 A.2d 16 (1974) (per curiam); *Gladden v. Cadillac Motor Car Division*, 83 N.J. 320, 416 A.2d 394 (1980); *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479 (3d Cir.1965); and *Henry Heide, Inc. v. WRH Products Co.*, 766 F.2d 105 (3d Cir.1985). We discuss *Gladden* and *Pritchard* in the text. See *infra* at 566. We do not find the other cases to be particularly helpful.

In *Jackson*, the Superior Court held that a hospital patient who contracted hepatitis from infected blood supplied by a blood bank could sue the blood bank for its breach of express warranty to the hospital. Mr. Cipollone stresses the sentence stating that "the patient . . . probably never saw the label [constituting the warranty] on the container of blood [that infected her]." 96 N.J.Super. at 330, 232 A.2d at 888. The case, however, is inapposite because the patient in that case was suing not under section 2-313 but under N.J.S.A. § 12A:2-318, which permits third party beneficiaries to sue for breach of express warranty. *Jackson* did not say that the hospital's reliance was irrelevant, yet that is the operative question. That a third party beneficiary may sue for breach of express warranty even if she did not rely on the affirmation of fact does not imply that the affirmation would constitute a warranty even if the buyer had not relied on it.

In *Collins*, the Superior Court held that a tire manufacturer's effort to limit a breach of express warranty remedy to replacement of the tires was unconscionable and hence unenforceable. The limitation on remedy was contained in a written warranty that also guaranteed the tires against "road hazards." The court did not discuss the meaning of "the basis of the bargain" but focused on the unconscionability of the remedy limitation. The Superior Court deemed one of the tire manufacturer's advertisements relevant to the case, in part because "the advertisement helped to explain the scope and intent of the 'road hazard' part of the warranty." 126 N.J.Super. at 408, 315 A.2d at 34.

(Cont'd)

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to give a clear answer as to whether reliance is required. Section

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Mr. Cipollone contends that *Collins* supports his position that reliance is not an element of section 2-313 because the court never discussed whether the buyer relied on the written warranty; the court merely stated that "[t]he warranty . . . was given to [the buyer] at the time he bought the tires." *Id.* at 405, 315 A.2d at 33. Despite Mr. Cipollone's request, we decline to base our decision on the New Jersey Superior Court's failure to discuss an issue.

Liggett contends that *Collins* supports its position because the Superior Court, immediately before its discussion about the advertisements stated that "[t]he jury could have inferred . . . that [the buyer had] relied" on the advertisement. *Id.* at 408, 315 A.2d at 34. We hesitate to place too much weight on this remark for three reasons.

First, as noted above, the Superior Court did not discuss the relevance of the buyer's reliance, it merely noted that the jury could have inferred that the buyer had relied and then continued with its discussion in a new sentence that began, "More importantly, the advertisement helped to explain the scope and intent of the 'road hazard' part of the warranty. . . ." *Id.*

Second, the issue in *Collins* that the Superior Court discussed was whether the remedy limitation was unconscionable; that the buyer's reliance on an advertisement making broad claims about the safety of the product was thought relevant to the issue of unconscionability does not necessarily imply that the buyer's nonreliance on a reasonable advertisement would have precluded the advertisement from becoming part of the manufacturer's express warranty.

Third, the New Jersey Supreme Court in its short per curiam opinion affirming the Superior Court further muddled the waters. In a statement obliquely favorable to Mr. Cipollone's position, the Supreme Court addressed the issue in terms of what would be "the natural reliance and the reasonable expectation of the purchaser flowing from the warranty," 64 N.J. at 263, 315 A.2d at 18, thus suggesting, as Mr. Cipollone argues, that the significant factor is what a purchaser would reasonably infer from the affirmation of fact or promise rather than what the purchaser in the case-at-bar actually inferred, and hence

(Cont'd)



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2-313(1)(a) is an adaption of section 12 of the Uniform Sales Act.<sup>25</sup>  
A comparison of the two sections reveals that they are

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relied on. However, the Supreme Court also discussed what "the purchaser of a tire buying it *because*" of the warranty would think, *id.* (emphasis added), hence suggesting that reliance had some role to play in discerning whether the warranty was unconscionable.

In light of all of these offsetting considerations, we do not believe that *Collins* is helpful in analyzing the issue before us.

In *Heide*, the issue was whether a chemical company's specification sheet, which listed several physical properties of the company's plastic, constituted an express warranty. This court analyzed the issue as follows:

The facts as stipulated show that the . . . sheet was not the basis of any bargain between [the chemical company and the manufacturer. The chemical company] gave no express warranty in this case that the [plastic] would conform to the . . . sheet, and thus [the plaintiff] cannot be the beneficiary of any such warranty.

766 F.2d at 112. The court did not say why it was holding that the sheet did not constitute an express warranty. The word "reliance" enters the opinion only through a recital of the chemical company's contention. *Id.* We therefore glean little guidance from *Heide*.

25. Section 12 of the Sales Act provides:

Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.

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substantially the same except for the replacement of section 12's express reliance requirement with section 2-313(1)(a)'s basis of the bargain requirement. The district court reasoned that the omission of the word "reliance" from section 2-313(1)(a), in light of section 12's use of that word, implied that reliance was no longer an element of express warranties. *See* 693 F.Supp. at 213. Liggett contends that "if U.C.C. § 2-313 wrought the radical change in New Jersey warranty law that the trial court has read into it," then "[o]ne would think that the New Jersey Study Comments would have at least made reference to it." Liggett Br. at 19. We note in this regard that the New Jersey Study Comment One to section 12A:2-313 states that "[t]his section of the Code is comparable to Section 12 of the Sales Act (N.J.S.A. 46:30-18), except that it characterized the warranties of sample and description as express warranties." There is no reference to the reliance issue.

Liggett argues that reliance must have some place in the "basis of the bargain" determination. Thus, even if reliance should be assumed, based on what "would reasonably induce the purchase of a product," a defendant must have the opportunity to prove non-reliance. The position finds some support in the U.C.C. comments. U.C.C. Official Comment 3 states:

In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, *any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof.* The issue normally is one of fact. (Emphasis added.)

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Moreover, comment 8 states that "all of the statements of the seller [become part of the basis of the bargain] *unless good reason is shown to the contrary*." (Emphasis added.) The plain language of these comments supports Liggett's opposition, at least to the extent it indicates that a defendant must be given some opportunity to show that the seller's statements were not meant to be part of the basis of the bargain.

This court has interpreted comment 3 before, in another tobacco case, *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479 (3d Cir.1965) (applying Pennsylvania law). In a footnote to a concurring opinion, Judge Freedman stated the following:

The comment by the drafters of the [U.C.C.] make it clear that what was formerly described as reliance [under § 12 of the Uniform Sales Act] is now absorbed as a factor which is made a basis of the bargain. Comment 3 to § 2-313 states that where a statement is made *during a bargain* no particular evidence of reliance need be shown, but that it remains a question of fact whether evidence introduced by the defendant is sufficient to show non-reliance.

350 F.2d at 41 n. 7 (Freedman, J., concurring).<sup>26</sup> *Pritchard* therefore reads the last sentence in comment 3 ("[A]ny fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof.") as qualifying the sentence that precedes it ("[N]o particular reliance need be shown.") In other

26. The court explicitly noted that Judge Freedman's concurrence represented "the majority view on the question of reliance," *Pritchard*, 350 F.2d at 487.

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words, even though "no particular reliance need be shown," the seller can "take [an] affirmation . . . out of the agreement" by showing that the buyer did not rely.

This interpretation of comment 3 appears consistent with that of the New Jersey Supreme Court. In *Gladden v. Cadillac Motor Car Division*, 83 N.J. 320, 416 A.2d 394 (1980), the Court held that a manufacturer's attempted limitation of its damages for breach of its express warranty could be given no effect in light of the "linguistic maze" of the warranty. *See id.* at 333, 416 A.2d at 401. The Court cited Comment 3, stating that "[p]articular reliance on such statements of description or quality need not be shown." *Id.* at 325, 416 A.2d at 396. The Court thus expressly rejected the view that the plaintiff has the burden of proving reliance on the seller's affirmation of fact, promise or description. Nonetheless, the statement that "particular reliance need not be shown," made in the context of a discussion about Comment 3, does not imply that a defendant cannot defeat a warranty claim by showing that the affirmation of fact, promise or description was not part of the basis of the bargain. We believe that *Gladden* states not that reliance is irrelevant, but only that the *plaintiff* need not prove reliance.

A final argument in support of a reliance requirement is found in the amicus brief. Without a reliance requirement, one runs the risk of draining the term "basis of the bargain" of all meaning, because the buyer's subjective state of mind becomes completely irrelevant. The district court instructed the jury that a statement could be considered part of the basis of the bargain if it "would naturally induce the purchase of the products." This instruction is completely objective and would permit a buyer to sue for breach of express warranty even if the seller's warranties were advertisements made in another state or country, and even if the



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buyer did not hear of the claims in these advertisements until the day that she walked into an attorney's office to bring suit for personal injury. It strains the language to say that a statement is part of the "basis" of the buyer's "bargain," when that buyer had no knowledge of the statement's existence.

The above arguments notwithstanding, it is possible to read the "basis of the bargain" requirement as requiring some subjective inducement of the buyer, without requiring a reliance finding. Requiring that the buyer *rely* on an advertisement, whether by imposing this burden initially on the buyer bringing suit, or by allowing the seller to rebut a presumption of reliance, puts a heavy burden on the buyer—a burden that is arguably inconsistent with the U.C.C. as a whole, with other comments to section 2-313 in particular, and with several commentators' suggestions in this area.<sup>27</sup>

The reliance requirement does not comport well with U.C.C. Official Comment 7 to section 2-313. Comment 7 states that "[i]f language is used after the closing of the deal . . . the warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order . . . ." N.J.S.A. § 12A:2-313 U.C.C. Comment 7. If a post-closing promise—on which, by definition, a seller cannot rely in deciding

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27. See, e.g., Shanker, *The Seller's Contractual Obligation Under U.C.C. 2-313 to Tell the Truth*, 38 Case W.Res.L.Rev. 40 (1987-88); Heckman, "Reliance" or "Common Honesty of Speech": *The History and Interpretation of Section 2-313 of the Uniform Commercial Code*, 38 Case W.Res.L.Rev. 1 (1987-88); Coffey, *Creating Express Warranties Under the U.C.C.: Basis of the Bargain—Don't Rely on It*, 20 U.C.C.L.J. 115 (1987); Lewis, *Toward a Theory of Strict "Claim" Liability: Warranty Relief for Advertising Representations*, 47 Ohio St.L.J. 671 (1986).

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to make a purchase—can create a warranty, then it is difficult to see why a pre-closing promise can create a warranty only if relied upon.

Additionally, a reliance requirement seems inconsistent with U.C.C. Official Comment 4 to section 2-313. Comment 4 states that "the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell." N.J.S.A. § 12A:2-313 U.C.C. Comment 4. Reliance is irrelevant to what a seller agrees to sell.<sup>28</sup>

In light of these seemingly inconsistent mandates on the reliance question, some might argue that it is foolish to try to reconcile what is patently inconsistent. We reject this suggestion however, because we find it feasible to reconcile the competing arguments, and we believe that the New Jersey Supreme Court would want us to try. We believe that the most reasonable construction of section 2-313 is neither Liggett's reliance theory, which fails to explain how reliance can be relevant to "what a seller agreed to sell," or the district court's purely objective theory,

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28. For example, imagine a tire merchant describing a tire to three different prospective purchasers, each listening to his sales talk at the same time. The seller guarantees that the tire will (1) be safe for use even in heavily loaded vehicles; (2) last at least 20,000 miles; and (3) be the same style tire sold with a Rolls Royce. The first purchaser buys the tire relying on the seller's safety warranty. The second buys the tire relying on the seller's durability warranty. The third buys the tire relying on the seller's style warranty. None of the purchasers communicates to the seller the reason why he or she is purchasing one of the tires, although the reason for the purchase is communicated to the buyer's spouse, who will later come forward to testify truthfully regarding what the buyer relied on when making the purchase. It is implausible that each buyer has a different warranty, and that the second buyer, but not the first or third buyers, can sue if the tire wears out before 20,000 miles.



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which fails to explain how an advertisement that a buyer never even saw becomes part of the "basis of the bargain." Instead, we believe that the New Jersey Supreme Court would hold that a plaintiff effectuates the "basis of the bargain" requirement of section 2-313 by proving that she read, heard, saw or knew of the advertisement containing the affirmation of fact or promise.<sup>29</sup> Such proof will suffice "to weave" the affirmation of fact or promise "into the fabric of the agreement," U.C.C. Comment 3, and thus make it part of the basis of the bargain.<sup>30</sup> We hold that once the buyer has become aware of the affirmation of fact or promise, the statements are presumed to be part of the "basis of the bargain" unless the defendant, by "clear affirmative proof," shows that the buyer knew that the affirmation of fact or promise was untrue. We believe that by allowing a defendant to come forward with proof that the plaintiff did not believe in the warranty,<sup>31</sup> we are reconciling, as the New Jersey Supreme Court

29. The burden that we place on the plaintiff stems in part from the fact that this case involves neither a written warranty delivered to the purchaser in connection with a sale nor an oral affirmation of fact or promise made to the purchaser in person by the seller. In both of those situations there is no question that the plaintiff has knowledge that the alleged warranty exists.

30. This interpretation of section 2-313 is also consistent with decisions of courts that have held that section 2-313 does "not . . . require a strong showing of reliance." *Sessa v. Riegle*, 427 F.Supp. 760, 766 (E.D.Pa.1977), *aff'd*, 568 F.2d 770 (3d Cir.1978). Because the district court's decision in *Sessa* was affirmed by judgment order, and not by a reported opinion, the decision is not binding precedent on this Court. See Third Circuit IOP Chapter 8C.

31. If the defendant proves that the buyer did not believe in the warranty, the plaintiff should then be given the opportunity to show that the buyer nonetheless relied on the warranty. It is possible to disbelieve, but still rely on, the existence of a warranty. In this sense, the buyer can "buy" a lawsuit. Thus,

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would want us to, the U.C.C. comments, the U.C.C. case law, and traditional contract principles, which serve as the background rules to the U.C.C.<sup>32</sup>

As indicated above, Comment 4 and Comment 7, as well as the largely dominant objective theory of contracts, militate

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if the buyer disbelieved the warranty, but could prove that she was relying on it when she bought the product for stipulated damages—for example, a refund—or economic damages—the difference between "the value of the goods accepted and the value of the goods would have had if they had been warranted," U.C.C. § 2-714. Such a buyer could not recover consequential damages, however. She would be barred by both U.C.C. § 2-715 ("[I]f [the injured person] discover[s] the defect prior to his use, the injury would not proximately result from the breach of warranty."), and traditional contract principles, under which a buyer has a duty to mitigate damages and cannot recover for damages that she "could have avoided without undue risk, expense or humiliation," *Restatement (Second) of Contracts* § 350(1) (1965).

Other courts have noticed the distinction between knowledge and reliance as well. See *Royal Business Machines v. Lorraine Corp.*, 633 F.2d 34, 44 (7th Cir.1980) ("The situation of the parties, their knowledge and reliance, may be expected to change . . . ." (emphasis added)). We emphasize that we are not adopting Liggett's rebuttable presumption of reliance theory. Reliance only comes into play if, after the defendant has proved non-belief, the plaintiff then tries to prove reliance despite non-belief, the burden is on the plaintiff to prove reliance despite non-belief and if she meets that burden she can collect economic damages.

32. N.J.S.A. 12A:1-103 states:

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy or other validating or invalidating cause shall supplement its provisions.

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in favor of interpretation of express warranty that ignores the buyer's subjective state of mind. Under the extreme version of this theory apparently adopted by the district court, all the buyer should have to show is what the seller agreed to sell. In other words, an express warranty would be created when a seller makes statements to the public at large that would induce a reasonable buyer to purchase the product, even if the actual buyer never heard those statements.<sup>33</sup> We find this result untenable, however. First, as mentioned above, this interpretation drains all substantive meaning from the phrase "basis of the bargain," and would allow a seller to collect even if that seller was unaware of the warranty until she walked into her attorney's office to file suit. Second, this interpretation is difficult, if not impossible, to square with other comments to the U.C.C. As discussed above, Comment 3 states that "no particular reliance on such statements need be shown . . . . Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof." Comment 8 states that "all of the statements of the seller [become part of the basis of the bargain] unless good reason is shown to the contrary." Clearly, both Comment 3 and Comment 8 envision some mechanism for overcoming the presumption that the seller's statements, even if heard by the actual buyer, are a basis of the bargain.

Much of the case law supports this "belief" principle. A

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33. The district court's interpretation of the "basis of the bargain" requirement is also objective in the weaker sense that in order to constitute an express warranty, a seller's statements must "*naturally*" induce the purchase of the product," 4 J.A. 234 (emphasis added). To that extent, we agree with the district court. However, for reasons explained in the text, we do not believe that either New Jersey or the drafters of the U.C.C. intended the buyer's awareness of, or belief in, the statements to be completely irrelevant.

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statement in the bill of sale that the goods are new does not constitute an express warranty when both the buyer and the seller knew that the statement was false. *See Coffee v. Ulysses Irrigation Pipe Co.*, 501 F.Supp. 239 (N.D. Tex.1980) When a buyer has operated trucks before and knows that they need repairs, he cannot sue in express warranty on the seller's statement that the trucks were in good condition. *See Janssen v. Hook*, 1 Ill.App.3d 318, 272 N.E.2d 385 (1971). "The same representation that could have constituted an express warranty early in the series of transactions might not have qualified as an express warranty in a later transaction if the buyer had acquired independent knowledge as to the fact asserted." *Royal Business Machines v. Lorraine Corp.*, 633 F.2d 34, 44 (7th Cir.1980). *See also Overstreet v. Norden Laboratories, Inc.*, 669 F.2d 1286, 1291 (6th Cir.1982) ("[A] statement known to be incorrect cannot be an inducement to enter a bargain."); *Wendt v. Beardmore Suburban Chevrolet, Inc.*, 219 Neb. 775, 782, 366 N.W.2d 424, 429 (1985) (Car dealer's statement were not a basis of the bargain when plaintiff suspected that the car had been in an accident and had his mechanic inspect it.).

Although these cases reject, to a certain extent, one traditional contract principle, that terms should be construed objectively, they embrace another traditional contract principle, that of looking at the intention of the parties in light of the surrounding circumstances. *See* 3 R. Anderson, *Uniform Commercial Code* § 2-313:36, at 29 (1983 & Supp.1987). The relevant intent is that the statement be part of the basis of the bargain, and that, "as in the case of any contract term, is a question of the intent of the parties." *Id.* at 30.<sup>34</sup>

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34. Although we have emphasized the relevance of a buyer's *belief*, our construction of section 2-213 can be read as simply fleshing out the more (Cont'd)



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## B.

Applying our interpretation of section 2-313 to the case at bar, we conclude that the district court's jury instructions were erroneous for two reasons. First they did not require the plaintiff to prove that Mrs. Cipollone had read, seen, or heard the advertisements at issue. Second, they did not permit the defendant to prove that although Mrs. Cipollone had read, seen, or heard the advertisements, she did not believe the safety assurances contained therein. We must therefore reverse and remand for a new trial on this issue.

There is ample evidence from which a jury could conclude that Mrs. Cipollone saw, read, or heard the advertisements. She frequently listened to the Arthur Godfrey show, and frequently read magazines that contained the advertisements. Thus, the awareness question is not problematic. However, there is also evidence that family members brought the hazards of smoking to her attention. Thus Liggett might be able to prove that she did not believe the advertisements that she saw.

Liggett contends that in light of the jury's answers to special

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commonly discussed *reliance* requirement with a framework of shifting presumptions and burdens of proof. Thus, in the context of advertisements claimed to be warranties, a plaintiff buyer must first prove that she saw the advertisements. This raises a (rebuttable) presumption of belief, which in turn raises an irrebuttable presumption of reliance. Next, a defendant seller may rebut the presumption of reliance, but only by proving that the plaintiff disbelieved the advertisement. *Cf. supra* note 28. Successfully proving disbelief creates a new rebuttable presumption by proving reliance directly. *See supra* note 31. Whether our holding is read as imposing a "belief" requirement or a "reliance" requirement thus is probably just a question of semantics, not substance.

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verdict questions 10 and 12, which addresses Mrs. Cipollone's cigarette use notwithstanding knowledge of the hazard, a new trial is inappropriate because it is entitled to a verdict in its favor on the express warranty claim as a matter of law.<sup>35</sup> We disagree. First, as explained above in part IV, the district court's jury instructions with respect to questions 10 and 12 did not limit the inquiry into Mrs. Cipollone's conduct to the pre-1966 period. Because the only potential warranties at issue in this case are Liggett's pre-1966 advertisements, in order to find no warranties the jury must find that Mrs. Cipollone disbelieved Liggett's pre-1966 advertisements, and it did not have an opportunity to do so.

Questions 10 and 12 also do not ask specifically whether Mrs. Cipollone knew that the advertisements were false. The jury's answers indicate that Mrs. Cipollone should have known cigarettes were harmful, despite Liggett's failure to warn. That does not mean that she actually knew that cigarettes were harmful, when Liggett was advertising to the contrary. The jury must be asked whether she disbelieved the advertisements. This is an inquiry distinct from (1) whether she should have disbelieved the advertisements,<sup>36</sup> and (2) whether it would have been unreasonable to smoke had Liggett not been advertising that smoking was safe. Consequently, Liggett is not entitled to rely on the jury's answers to these questions to preclude a new trial on the question whether its advertisements constituted express warranties.

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35. Liggett invokes the doctrine of "estoppel by verdict." For the reasons explained in the text, we do not find that doctrine applicable.

36. We note that if she should have disbelieved the advertisements it is not likely that the advertisements would naturally induce the purchase of the product.



VII. DID THE DISTRICT COURT ERR IN FAILING TO INSTRUCT THE JURY THAT COMPARATIVE FAULT PRINCIPLES APPLY TO AN EXPRESS WARRANTY CLAIM?

A.

Liggett contends that New Jersey law permits a manufacturer to assert a comparative fault to an express warranty products liability suit and that the district court consequently erred in failing to so instruct the jury. We agree that comparative fault principles may be applicable in some express warranty cases, but we do not believe that they are applicable here.

In *Cintrone v. Hertz Truck Leasing & Rental Service*, 45 N.J. 434, 212 A.2d 769 (1965), the plaintiff alleged that the brakes on his employer's leased truck failed, causing an accident. Cintrone sued the lessor, alleging that the defendant had breached its "warranty that the vehicle was fit and safe for use. (Whether the alleged warranty was express or implied was not specified.)." *Id.* at 438, 212 A.2d at 771. The defendant asserted that the plaintiff could not recover because the problem with the truck's brakes was known to the plaintiff before the accident. The New Jersey Supreme Court held that on the facts of the case the jury could have concluded that the plaintiff "with knowledge of the danger presented by the defective brakes failed to take the care for his own safety which a reasonably prudent person would have taken under the circumstances. Therefore, it would have been improper for the trial court to have removed the defense of contributory negligence from jury consideration." *Id.* at 459, 212 A.2d at 783.

In *Maiorino v. Weco Products Co.*, 45 N.J. 570, 214 A.2d

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18 (1965) (per curiam) the New Jersey Supreme Court also held that contributory fault was a defense to a breach of warranty suit. In that case, the plaintiff injured himself while attempting to open the glass container on his newly purchased toothbrush. The plaintiff sued the manufacturer charging negligence and breaches of implied warranties of merchantability and fitness of the product for use. The Supreme Court held that a contributory fault defense was properly submitted to the jury:

As we pointed out in *Cintrone*, the authorities in various jurisdictions are in confusion and seeming conflict on the subject of availability of the defense of contributory negligence in products liability cases based on breach of express or implied warranty of fitness. The various texts and cases referred to therein reveal that most jurisdictions bar plaintiff's recovery where his misuse or abuse of the product in combination with a defect in the product, brings about his personal injury, or where he continued to use the product with knowledge, actual or constructive, or its defective condition

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*Id.* at 573, 214 A.2d at 19.

The issue before us, whether comparative fault is available in an express warranty action, was not addressed in either *Cintrone* or *Maiorino*. Neither of those cases clearly involved express warranties.<sup>37</sup> The last time we were faced with this issue was in

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37. The differences between express and implied warranties are significant in this context. Implied warranties involve societal standards imposed by law. (Cont'd)

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a case involving the same defendant and, indeed, many of the same warranties. In *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479, 485 (3d Cir.1965), interpreting Pennsylvania law, we found that the doctrine of assumption of risk, in its primary sense, was available as an affirmative defense in an express warranty claim.

Crucial to our analysis in *Pritchard* was the distinction between primary and secondary assumption of risk. In its primary sense, assumption of risk involves a voluntary exposure to a known danger, which negates liability. "Under this concept recovery is barred because the plaintiff is assumed to have relieved the defendant of any duty to protect him." *Id.* at 484. In its secondary sense, assumption of risk is synonymous with contributory negligence—a plaintiff is barred from recovery because of her departure from reasonable standards of care, despite the negligence of the defendant. *Id.*

In *Pritchard*, we concluded that assumption of risk in the

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Express warranties involve standards that the seller promises to deliver. If implied warranties hold sellers responsible for legally imposed duties of care, it only seems fair that buyers are held responsible to similar legally imposed standards of due care. Thus, the New Jersey Supreme Court has held that comparative fault principles should apply in implied warranty cases. However, the legally enforced obligation to honor express warranties stems from society's interest in enforcing promises. See *Spring Motors Distributors, Inc. v. Ford Motor Co.*, 98 N.J. 555, 579, 489 A.2d 660, 672 (1985). It is not nearly as clear that what the buyer does should be relevant in determining whether the law will hold the seller liable for what it has promised. Thus, because *Maiorino* involved only implied warranties and *Cintrone* did not specify whether there was any express warranty involved, we do not read those cases to stand for the proposition that comparative fault principles automatically apply in express warranty cases.

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sense of contributory negligence is not available in a breach of warranty action. We then concluded that "a person who voluntarily exposes himself to a danger of which he has knowledge, or has had notice, assumes the attendant risk." *Id.* at 485. This reading is in accord with Dean Prosser's views:

[T]he plaintiff[']s . . . failure . . . to take precautions against [the] possible existence [of a product's danger does] not . . . bar . . . an action for breach of warranty . . . . But if he discovers the defect, or knows the danger arising from it, and proceeds nevertheless deliberately to encounter it by making use of the product, his conduct is the kind of contributory negligence which overlaps assumption of risk; and on either theory his recovery is barred.

Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 Minn.L.Rev. 791, 838-39 (1966).

We reversed the jury verdict for the defendant in *Pritchard* because we found that under the more narrow, primary definition of assumption of risk, the jury could not have concluded that the plaintiff voluntarily exposed himself to a known danger. We found that the jury instructions "were inadequate and confusing in that they failed to differentiate between the primary and secondary concepts [of assumption of risk]." 350 F.2d at 486. In reaching that conclusion we noted that "the defendant's advertisements carried factual affirmations, professedly based on medical research [and that the advertisements] were calculated to overcome any fears the potential consumers might have had as to the harmful effects of cigarettes, and particularly Chesterfields. Under the circumstances it is difficult to perceive



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how the plaintiff, a cabinetmaker with no scientific background, could have been charged with notice or knowledge of a danger, which the defendant, with its professed superior knowledge, extensively advertised did not exist." *Id. Pritchard*, however, which involves Pennsylvania law, does not control this case.

The New Jersey cases, *Cintrone* and *Maiorino*, do not speak to whether a comparative fault defense is available in an express warranty action. Even *Pritchard's* previous interpretation of Pennsylvania's express warranty law indicates that comparative fault is available only to the extent that a plaintiff voluntarily exposes herself to a danger of which she had specific knowledge. In order to answer Liggett's contention that comparative fault — in the sense of primary assumption of risk — should be available as a defense to this express warranty claim, we turn to an analysis of the warranty involved here.

As is discussed in Part VI, in order to make out a *prima facie* express warranty claim, Mr. Cipollone must show that Liggett's affirmations were part of the basis of the bargain. As long as the plaintiff can show that Mrs. Cipollone knew of Liggett's affirmations of fact, those affirmations are presumed to be a basis of the bargain unless Liggett can prove that she did not believe those advertisements. Arthur Godfrey referred to the fears about smoking as "applesauce." 5 J.A. 158.<sup>38</sup> If Mrs. Cipollone believed him, she could not have had the subjective knowledge about the harms of smoking that would permit a jury

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38. Defendant has not argued, nor do we believe that they could argue, that belief in their advertisements was unreasonable.

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to conclude that she voluntarily assumed a known risk.<sup>39</sup>

In theory, the comparative fault defense is available to Liggett to the extent that it can prove that after having believed the advertisements, Mrs. Cipollone learned that they were untrue and continued to smoke the cigarettes that the advertisements had caused her to buy. The court must recognize, however, that any cigarettes that plaintiff bought after she ceased believing in defendant's affirmations would not, as a matter of law, be cigarettes smoked in breach of the warranty. The warranty would not exist as to those cigarettes because Mrs. Cipollone would not have believed Liggett's affirmations when she bought them. Thus, although it would be theoretically possible for the defendants to win on a comparative fault defense that did not involve misuse or abuse, as a practical matter it would be almost impossible. If the jury finds that the cigarettes that Mrs. Cipollone smoked in breach of the express warranty proximately caused her cancer, then it is implicitly finding that she believed the advertisements when she bought those cigarettes.

If she bought some cigarettes while believing in the advertisements and then learned that the advertisements were false and smoked those previously purchased cigarettes anyway, then she would have been assuming a known risk when she smoked the previously purchased, warranted cigarettes. We conclude that under such circumstances, she could be barred, by reason of contributory fault, from recovering on an express warranty claim.

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39. Defendants could prevent Mr. Cipollone's recovery on the express warranty claim if, despite finding the warranty, the jury finds that the plaintiff misused or abused the cigarettes. There is no evidence of misuse or abuse in this record, however. Plaintiff was using the cigarettes just as Liggett advertised that she should.



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But that would require a jury finding that it was those specific cigarettes, bought while believing the advertisements but smoked after she knew that the ads were false, that caused her cancer. No reasonable jury could find this unless Mrs. Cipollone bought vast amounts of cigarettes in bulk, and there is no evidence in the record that she did.

Liggett's defense is thus more appropriate in the more typical U.C.C. case. For instance, if a tire purchaser relied on the affirmations of the seller, then discovered that the seller's affirmation was false, and then used the tire anyway, she could be barred from recovering on an express warranty claim under an assumption of risk theory. Because the purchaser believed the affirmations when she purchased the tire, the tire would be warranted. Still the law would not allow her to collect on that warranty if she used the tire after she learned that the seller's affirmations were false. This scenario is inapplicable in the cigarette context because the few cigarettes used after learning of a warranty's falsity cannot cause the kind of harm that one defective tire can.

In sum, we find that a comparative fault defense is available in an express warranty action, but only to the extent that the defendant can show that the buyer misused or abused the product or used the product after learning that the warranty was false. We do not think that that would be possible in this case. There is no evidence that Mrs. Cipollone misused cigarettes. To the extent that she knew cigarettes were bad for her and hence did not believe Liggett's advertisements to the contrary, she cannot collect on an express warranty theory, but not because she assumed the risk of the cigarettes. If she did not believe the advertisements, then they could not have formed a basis of the bargain in the first

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place, and the jury could not find an express warranty.<sup>40</sup>

## B.

The same rationale that overcomes Liggett's comparative fault defense overcomes Liggett's contention that Mrs. Cipollone's knowledge of the advertisements' falsity breaks the chain of causation linking Liggett's breach to Mrs. Cipollone's injury. Liggett contends that the district court erred in failing to instruct the jury that if a buyer uses a product with knowledge of its warranty-breaching defect, any personal injuries arising from that use did not proximately result from the breach of warranty. Arguably, section 2-715 of the U.C.C., which provides that "[c]onsequential damages resulting from the seller's breach include . . . injury to person . . . proximately resulting from any breach of warranty," required such an instruction. See N.J.S.A. § 12A:2-715.<sup>41</sup>

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40. As an alternative basis for declining to grant Liggett's motion for a new trial or judgment n.o.v. on this issue, the district court held that Liggett had failed to object to the jury charge on the issue of contributory fault with respect to the express warranty claim and had therefore waived it pursuant to Fed.R.Civ.P. 51. Although this issue is now no longer relevant, both because there will be a new trial and because of our finding that comparative fault could not be applicable in this case unless Liggett can prove abuse or misuse, we are satisfied that Liggett did adequately object to the district court's ruling on this issue. See Defendant's Objections

41. In its opinion denying Liggett judgment n.o.v., the district court held that Liggett had waived this point by failing to object to jury instructions at trial. See Fed.R.Civ.P. 51. As in the district courts waiver determination in the comparative fault context, the waiver issue is no longer relevant because there will be a new trial. Nonetheless, given the complexity of the case, and the potential importance of this issue on retrial, we think it important to give the district court the benefit of our views on this aspect of the matter.

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Liggett relies on U.C.C. Official Comment 5 to section 2-715 ("[I]f [the injured person] discover[ed] the defect prior to his use, the injury would not approximately result from the breach of warranty.") and New Jersey Study Comment 1 to section 12A:2-715 ("[I]f the buyer's own fault or negligence contributes to the injury (e.g., by using the goods with knowledge of their defects), he cannot recover consequential damages, because such damages are not proximately due to the breach of warranty."). Both of these comments imply that the buyer's knowledge of a defect breaks the chain of proximate causation because, in effect, the plaintiff's behavior is an intervening cause. The seller could not reasonably foresee that a buyer would use a product once that buyer learned that the product was defective.

Like the comparative fault defense, however, the knowledge-as-intervening-cause argument applies in the kind of case represented in the tire hypothetical outlined above, not the cigarette sales at issue in this case. If a buyer uses a tire after having discovered a warranty-breaching condition that makes use of that tire unreasonable, then she cannot collect consequential damages under the warranty. In the instant case, however, once the plaintiff discovered that Liggett's advertisements were false, the cigarettes she purchased after that time must, as a matter of law, have been unwarranted, and therefore would not be considered by a jury asked to determine whether the cigarettes she smoked that were in breach of Liggett's warranty proximately caused her lung cancer.

Thus, both the comparative fault and the causal chain arguments fail to defeat the express warranty claim because both contentions depend on Liggett's proving that Mrs. Cipollone *knew* that the advertisements were false. But the basis of the bargain provision in N.J.S.A. § 12A:2-313 requires that the buyer believe the advertisements. If Liggett proves that she did not believe their

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advertisements, then there is no warranty in the first place. In other kinds of cases, subsequently acquired knowledge and use may constitute either comparative fault or an intervening cause sufficient to bar recovery, but in those cases there is sufficient time for the plaintiff to buy the product while believing in the warranty, subsequently learn of the warranty's falsity, and proceed to use the product nonetheless. If that subsequent use results in serious damage, the buyer cannot recover. No serious damage could result from a comparable kind of "subsequent use" in this case because Mrs. Cipollone could not have been seriously hurt from cigarettes bought while believing in the advertisements but smokes after learning of the advertisements' falsity.

Liggett must be given the opportunity at the outset to prove that at some point prior to January 1, 1966, Mrs. Cipollone ceased to believe, or never believed, Liggett's advertisements. If the jury finds such disbelief, they must be instructed to find that the advertisements could not have formed the basis of the bargain for cigarettes she purchased after that date. As to cigarettes purchased and smoked before that date, however, for which the advertisements would constitute a basis of the bargain, Liggett should not be given another opportunity to prove what they failed to prove in the first instance, i.e. that Mrs. Cipollone did not believe the advertisements.

#### VIII. WAS THERE SUFFICIENT EVIDENCE TO SUPPORT A JURY FINDING THAT MRS. CIPOLLONE'S INJURY WAS CAUSED BY LIGGETT'S BREACH OF EXPRESS WARRANTY?

Liggett contends that it is entitled to judgment n.o.v. on the express warranty claim because the record contains insufficient evidence to support a jury verdict for Mr. Cipollone on this point.



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At the outset, we note that the express warranty provision of the Uniform Commercial Code, section 2-313, makes clear that no formality or magic words are required to create an express warranty. "It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty . . . ." N.J.S.A. § 12A:2-313(2) (1970). The seller may be liable if its representation regarding the goods takes the form of newspaper, magazine, radio or television advertisements. See *Collins v. Uniroyal, Inc.*, 126 N.J. Super. 401, 405, 315 A.2d 30, 33 (App. Div. 1973) (per curiam), *aff'd*, 64 N.J. 260, 315 A.2d 16 (1974) (per curiam); *Drayton v. Jiffie Chemical Corp.*, 591 F.2d 352, 358 (6th Cir. 1978); J. White & R. Summers, *Uniform Commercial Code* 335-36 (2d ed. 1980). Consequently, Mr. Cipollone was free to rely, as he did, on advertisements to prove the existence and scope of Liggett's warranty.<sup>42</sup>

## A.

Liggett contends that the record contains insufficient evidence

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42. Liggett commences its argument by pointing out that to recover on an express warranty claim, the plaintiff must show a *breach* of an express warranty. We agree. A suit cannot be maintained on an express warranty theory if the injury complained of resulted from an occurrence or product characteristic outside the scope of the express warranty. If a tire manufacturer, for example, warrants against blowouts when its tires are "used in normal passenger car service," a suit cannot be maintained on an express warranty theory if the blowout complained of occurred while the car was not being used in normal passenger car service. See *Collins*, 126 N.J. Super. at 405, 315 A.2d at 33-34. The manufacturer may, however, make warranties that go far beyond promising that the goods will be free from defect, and if it does so, the freedom of the product from defect is irrelevant to an express warranty claim. See *Collins*, 64 N.J. at 262, 315 A.2d at 17. As our discussion makes clear, however, we think that there is sufficient evidence of both (1) the existence of a warranty that cigarettes were safe and (2) breach of that warranty.

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to support a finding that Liggett breached any warranty in the instant case. More specifically, Liggett maintains that there is insufficient evidence "to support a finding that Liggett made any express warranty warranting against serious health effects in the future from long term cigarette use." Liggett Br. at 34-35. Although the question whether a particular set of representations made by the seller amounts to an express warranty is normally one of fact, and consequently for the jury to decide, see *Gladden v. Cadillac Motor Car Division*, 83 N.J. 320, 325, 416 A.2d 394, 396 (1980), a judgment n.o.v. may be granted under Fed. R. Civ. P. 50(b) if the record is "critically deficient of that minimum quantity of evidence from which a jury might reasonably afford relief." " " *Powell v. J.T. Posey Co.*, 766 F.2d 131, 133-34 (3d Cir. 1985) (citations omitted). This question is one of law, over which our review is plenary. See *id.* at 134.

Many Chesterfield and L & M advertisements were submitted to the jury. Liggett contends that "[n]one of them could constitute to a reasonable person a warranty covering serious health effects in the future from long term use of cigarettes." Liggett's Br. at 35. We disagree.

One Chesterfield advertisement stated, without qualification, that "NOSE, THROAT, and Accessory Organs [are] not Adversely Affected by Smoking Chesterfields." See *supra* at 548. The advertisement discussed a "study by a competent medical specialist and his staff on the effects of smoking Chesterfield cigarettes" on a study group that included "men and women" who had "continually" smoked "10 to 40" cigarettes per day for "one to thirty years." Members of the study group were "given a thorough examination, including X-ray pictures" at "the beginning and at the end of" a "six-month[ ] period." According to the advertisement, "[t]he medical specialist, after a thorough



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examination of every member of the group," concluded that "the ears, nose, throat and accessory organs of all participating subjects examined . . . were not adversely affected in the six-month period by smoking the cigarettes provided."

In a radio commercial, Arthur Godfrey related the story of another of these "six-month[ ] period" studies involving thirty-year chain smokers and stated that the study was "proof" of the proposition that Chesterfield cigarettes "never . . . did you any harm." *See supra* at 549. Mr. Godfrey also told his listeners that he could not remember ever seeing a "gravestone" stating that the buried individual had "[s]moked [t]oo [m]uch." *See supra* note 2. One magazine advertisement declared in a bold typescript that the consumer should "PLAY SAFE" and "Smoke Chesterfield." *See supra* at 548. A series of television and magazine advertisements for the L & M brand stated that the cigarettes were "just what the doctor ordered." *See supra* at 550.

We hold that a reasonable jury could conclude from these advertisements, and the many others entered into evidence, that Liggett had represented to the consumer that the long-term smoking of Chesterfield and L & M cigarettes would not endanger the consumer's health, and that these warranties were untrue. Liggett cannot be granted judgment n.o.v. on the ground that the advertisements represented only that short-term smoking was safe. A reasonable jury could infer that an unqualified representation that smoking is safe creates a warranty that smoking for a long period of time is safe.

Furthermore, several of the purported "studies" conducted by "medical specialists" from a "responsible consulting organization" involved smokers who, the advertisements took care to note, smoked heavily for up to thirty years. A reasonable jury

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could interpret the inclusion of persons who had smoked heavily for thirty years in the studies as representing that smoking for a long period of time was safe. "[B]road general assertions of quality, and particularly those of safety, as for example that . . . cigarettes are . . . 'harmless' or 'safe to smoke,' may readily be found by the jury to include a representation that there is nothing to make the product unsafe." W. Prosser, *Handbook of the Law of Torts* 653 (4th ed. 1971). Indeed, the last time we reviewed the Liggett advertisements at issue in this case, we concluded that "[t]he evidence compelling points to an express warranty, for the defendant, by means of various advertising media, not only repeatedly assured [the consumer] that smoking Chesterfields was absolutely harmless, but in addition the jury could very well have concluded that there were express assurances of no harmful effect on the lungs." *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292, 296 (3d Cir.1961). The district court did not err in refusing to grant judgment n.o.v. on the ground that Mr. Cipollone failed to introduce sufficient evidence to uphold the jury verdict with respect to the scope of Liggett's express warranty.

## B.

Neither do we find, as Liggett contends, that there was insufficient evidence to prove that Mrs. Cipollone's smoking caused her cancer. In its opinion denying Liggett's motion for a judgment n.o.v., the district court concluded that Liggett's "no adverse effects" Chesterfield advertisements began to run in 1952, *see* 693 F.Supp. at 214 & n. 8, a conclusion supported by the evidence discussed above and which the plaintiff has not challenged in its brief. The evidence also supports the conclusion that the L & M "just what the doctor ordered" advertisements began before Mrs. Cipollone switched to that brand in 1955. Hence the jury could have found that Mrs. Cipollone smoked cigarettes that

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were in breach of warranty from 1952 until as late as 1966 (the date at which the express warranty claim is cut off by our interlocutory preemption decision).

The jury found that Mrs. Cipollone's smoking of cigarettes that were in breach of the warranty proximately caused her lung cancer and death. See Special Verdict Question 15 (quoted *supra* at 554). Liggett contends that the record does not contain sufficient evidence to support this finding and that the district court consequently erred in declining to grant judgment n.o.v. on this point. Although a great deal of evidence was introduced that Mrs. Cipollone's cancer was caused by her 40 years of smoking, Liggett contends that there is no evidence that demonstrates that her cancer was caused by smoking from the years 1952 to 1966. We disagree. As previously noted a judgment n.o.v. may be granted only if the record is " 'critically deficient of that minimum quantity of evidence from which a jury might reasonably afford relief.' " *Powell*, 766 F.2d at 133-34 (citations omitted).

The statistical correlation between heavy smoking and lung cancer is well-documented.<sup>43</sup> The plaintiff presented expert

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43. In 1984, Congress mandated rotating warnings on cigarette packages; one of these warnings states "SURGEON GENERAL'S WARNING: SMOKING CAUSES LUNG CANCER . . . ." 15 U.S.C. § 1333(a)(1) (Supp. II 1984). The Surgeon General has concluded that "the case for cigarette smoking as the principal cause of lung cancer is overwhelming." U.S. Dep't Health & Human Serv., *The Health Consequences of Smoking: Nicotine Addiction—A Report of the Surgeon General* 11 (1988) (quoting U.S. Public Health Service, *The Health Consequences of Smoking: A Public Service Review—1967* (rev. ed. 1968)). See also U.S. Dep't Health & Human Serv., *The Health Consequences of Smoking: Cancer—A Report of the Surgeon General* (1982); U.S. Dep't Health & Human Serv., *The Health Consequences of Smoking for Women: A Report of the Surgeon General* (1980); U.S. Dep't Health, Educ. & Welfare, *Smoking*

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testimony from qualified witnesses that smokers are much more likely to contract lung cancer than non-smokers, especially non-smokers such as Mrs. Cipollone, for whom there is no evidence of exposure to any cancer causing agent other than cigarette smoke. In addition, these experts testified that Mrs. Cipollone's early years of smoking contributed more — on a year-to-year basis — than her later years of smoking because the lung injury produced from smoking early on is an injury that has many more years of potential to develop cancer than the injury incurred later in life.

The district court instructed the jury that it could find proximate cause in a case in which "[t]here may be two or more concurrent and directly cooperative and efficient proximate causes of an injury" if the defendant was "a substantial contributing factor in [causing the plaintiff's] injuries." As we have explained, these instructions were correct. Under these instructions, the jury could have reasonably concluded from the foregoing evidence that Mrs. Cipollone's smoking from 1952 to 1966 proximately caused her lung cancer. Her smoking from 1952 to 1966 could clearly have been found to be "a substantial contributing factor" in the development of her lung cancer. Liggett has not challenged the jury instructions' definition of proximate cause on appeal with respect to the express warranty claim.

Mr. Cipollone presented sufficient evidence concerning the causal link between Mrs. Cipollone's lung cancer and her smoking between 1952 and 1966 that a grant of judgment n.o.v. on this issue under Fed.R.Civ.P. 50(b) would not have been appropriate.

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and Health: A Report of the Surgeon General (1979); U.S. Dep't Health, Educ. & Welfare, *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service* (1964).



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## IX. THE RISK-UTILITY CLAIM

The District Court ruled that the New Jersey Products Liability Act, N.J.S.A. § 2A:58C (hereafter "The Act") operated in this case to bar plaintiff's risk-utility claim.<sup>44</sup> Section 3(a)(2) of the Act provides that if the plaintiff asserts a design defect claim against a manufacturer, the manufacturer shall not be liable if:

The characteristics of the product are known to the ordinary consumer or user, and the harm was caused by an unsafe aspect of the product that is an inherent characteristic of the product and that would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the class of persons for whom the product is intended . . . .

To the extent that the Act imposed new rules with regard to the imposition of liability, it purported only to apply to actions filed after the date of its enactment. Section 8 of the Act provides that the act "shall take effect immediately except that provisions of this act that establish new rules with respect to burden of proof or the imposition of liability in product liability actions shall apply only to product liability actions filed on or after the date of enactment." In its October 27, 1987, opinion, however, the district court found that, based on the New Jersey Assembly Insurance Committee's report, the New Jersey legislature intended section 3(a)(2) to be a codification of existing common law and hence that the legislature intended that section to be applied retroactively.

44. The risk-utility claim alleged that the risk of cigarettes outweighed their social utility. See Plaintiff's Third Amended Complaint, 1 J.A. 39, 42.

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Although the district court disagreed with the legislature on the question whether section 3(a)(2) was a codification of existing law, the court nonetheless held that section 3(a)(2) applied to the Cipollone case, even though it was filed before the Act became law, because the legislature's belief that it was not a new rule reflected an intent that the rule be applied retroactively.

The applicability of section 3(a)(2) to claims like this is currently before the New Jersey Supreme Court in another tobacco case, *Dewey v. Brown & Williamson Tobacco Corp.*, 225 N.J.Super. 375, 542 A.2d 919 (App.Div.), *certif. granted*, 113 N.J. 379, 550 A.2d 481 (1988). We think it highly unlikely that the issue will not be resolved definitively by the time the instant case is re-tried. Therefore, we will not dwell at length on the issue.

We do not believe that section 3(a)(2) was a codification of existing common law, although it may have been a clarification of New Jersey law. See N.J.S.A. 2A:58C-1, Senate Judiciary Committee Statement at 464-65 ("These sections [2-4] are intended to establish clear rules with respect to specific matters as to which the decisions of the courts in New Jersey have created uncertainty."). See also *Whitehead v. St. Joe Lead Co.*, 729 F.2d 238 (3d Cir.1984) (the levels at which lead exposure becomes dangerous are not generally known, but general public knowledge of danger is relevant to the risk-utility injury); *O'Brien v. Muskin Corp.*, 94 N.J. 169, 463 A.2d 298 (1983) (generalized knowledge of above ground swimming pools did not prevent a risk-utility claim from going to the jury).

As a clarification, the provision was meant to be applied retroactively, because section 8's "prospective only" provision applies only to new rules. Nonetheless, we cannot affirm the district court's decision to deny, as a matter of law, plaintiff's generic



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risk-utility claim because, applying the language of the Act, we cannot find, and we do not think that there was sufficient evidence for the district court to find, that the "inherent[ly] [dangerous] characteristic[s]" of cigarettes were known to the "ordinary consumer or user," prior to 1966. This is an issue of fact for the jury.<sup>45</sup>

Our view is in accord with what the Appellate Division of the Superior Court held in *Dewey*. That court wrote: "[w]e have no quarrel with defendant's proposition that plaintiff may not recover if a factfinder concludes that the death of her decedent was caused in large measure from exposure to the danger inherent in all cigarettes, a danger *acknowledged* to be within his contemplation as an ordinary consumer." 275 N.J.Super. at 386, 542 A.2d at 925 (emphasis added). No such ordinary consumer knowledge has been acknowledged in this case, and it is up to the jury to determine what the ordinary consumer knew. Therefore we will remand on this issue, and, if the New Jersey Supreme Court has not written expansively enough to dispose of this issue before the case is retried, the plaintiff should be allowed to proceed on his generic risk-utility claim.<sup>46</sup>

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45. The district court (in an unpublished opinion of October 27, 1987) apparently relied on comment i to Section 402A of the Restatement (Second) of Torts, which the drafters of the Product Liability Act meant to incorporate. See N.J.S.A. 2A:58C-1, Senate Judiciary Committee Statement at 465. Comment i says that "[g]ood tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful." As the Appellate Division of the Superior Court did in *Dewey*, 542 A.2d at 925, we reject the applicability of comment i in this situation. The fact that the New Jersey legislature endorsed comment i in 1987 does not mean that the ordinary consumer must have known about the harms of smoking in, for example, 1958.

46. The district court granted a directed verdict for the defendants on the  
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## X. PREJUDGMENT INTEREST

The district court denied plaintiff's request for prejudgment interest because the jury awarded the plaintiff contract, not tort damages. New Jersey Court Rule 4:42-11(b) reads as follows:

(b) Tort Actions. Except where provided by statute . . . the court shall, in tort actions, including products liability actions, include in the judgment simple interest . . . .

The district court declined to follow *Collins v. Uniroyal, Inc.* 130 N.J.Super. 169, 325 A.2d 854 (Law Div.1974), in which the New Jersey Superior Court awarded prejudgment interest on an express warranty claim, because the court found that *Collins* was "contrary to the plain language of the provision." 696 F.Supp. 208, 221. The district court also found that there was no equitable basis for awarding prejudgment interest and that one of the purposes behind such an award, complete compensation of the plaintiff, would not be furthered because, theoretically, part of Mr. Cipollone's recovery on the express warranty claim was for loss of future services from his wife. *Id.* at 222.

Of course, the availability of prejudgment interest may be mooted on retrial because a new jury may not grant an award

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plaintiff's alternative design claim. See 683 F.Supp. 1487, 1493-95 (D.N.J.1988). This decision has not been appealed and thus the plaintiff will not be free to advance this claim again. However, we note that because the Federal Labeling Act, which formed the basis of our preemption decision, does not preempt design defect claims, plaintiff may (as of this writing) proceed against co-defendants Philip Morris and Lorillard, as well as Liggett, on the risk-utility claim.

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on the basis of breach of express warranty.<sup>47</sup> If the new jury does grant such an award, however, we believe that the plaintiff should be entitled to some prejudgment interest. Unlike the district court, we do not find that the holding and logic of *Collins* is contrary to the plain language of the rule.

As the court in *Collins* pointed out, the language of the rule ("in tort actions, including products liability actions") indicates that the drafters wanted to include actions in addition to just those sounding in tort. Otherwise, the inclusion of the "products liability" language would be superfluous. *Collins*, 130 N.J. Super. at 172-73, 325 A.2d at 855. This is, of course, a products liability case. The court in *Collins* also emphasized that the policy underlying the rule is to inhibit delay and encourage settlement. 130 N.J. Super. at 173, 325 A.2d at 856. These policy concerns seem particularly applicable in the case at bar, which has already been the source of seven district court opinions, four of them published, and three published opinions by this court. Furthermore, *Collins*, a fifteen year old decision, has not been significantly questioned or challenged. We think it appropriate to defer to the New Jersey court's interpretation of the New Jersey Rule and therefore conclude that the district court erred to the extent that it held that prejudgment interest is never available on an express warranty products liability claim.

Neither do we believe that the New Jersey prejudgment interest is wholly inapplicable to future compensation awards. Rule 4:42-11(b) states that prejudgment interest is appropriate except in "exceptional cases." The district court reasoned that prejudgment interest was inappropriate, in part, because Mr.

47. It is not disputed that if there is a failure to warn award, prejudgment interest will be appropriate.

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Cipollone's award was based on loss of *future* services. Nonetheless, the New Jersey Supreme Court, albeit in dictum, has said: "[t]he applicability of a compensation rationale for prejudgment interest may be questionable in the case of future losses, since it can be argued that those damages accrue after the judgment. However, the public interest in encouraging settlements is an adequate independent basis for the application of the prejudgment interest rule in this case." *Ruff v. Weintraub*, 105 N.J. 233, 245, 519 A.2d 1384, 1391 (1987). In light of the protracted nature of this litigation, we believe that the New Jersey Supreme Court would opt to follow their prescriptions in *Ruff*. See also *Salas by Salas v. Wang*, 846 F.2d 897, 908-10 (3d Cir. 1988). Thus, in the absence of further guidance from the New Jersey courts on the point, which we would welcome, we do not believe that the post-judgment compensation element of an award in this case constitutes an "exceptional" circumstance that should "suspend the running of . . . prejudgment interest." Rule 4:42-11(b).

#### XI. DID THE DISTRICT COURT ERR IN GRANTING PARTIAL SUMMARY JUDGMENT FOR MR. CIPOLLONE WITH RESPECT TO THE DEFENDANTS' STATUTE OF LIMITATIONS DEFENSE?

New Jersey has a two year statute of limitations for personal injury actions, see N.J.S.A. § 2A:14-2, and has adopted the discovery rule. Under this doctrine, a cause of action will be held not to accrue until the injured party " 'learns, or reasonably should learn, the existence of that *state of facts* which may equate in law with a cause of action.' " *Vispiano v. Ashland Chemical Co.*, 107-N.J. 416, 426, 527 A.2d 66, 71 (1987) (per curiam) (citation omitted) (emphasis in original). Stated differently, a cause of action will be held not to accrue until the injured party



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“ ‘discovers, or by the exercise of reasonable diligence and intelligence should have discovered[,] that he may have a basis for an actionable claim.’ ” *Id.* at 419, 527 A.2d at 67 (citation omitted).

Mrs. Cipollone's lawsuit was filed on August 1, 1983. The district court granted (partial) summary judgment against the defendants on their statute of limitations defense, holding that no reasonable jury could conclude that Mrs. Cipollone discovered, or by the exercise of reasonable diligence should have discovered, the facts giving rise to her claims prior to August 1, 1981. Liggett contends that the evidence in the record was sufficient to support a jury finding that Mrs. Cipollone discovered or should have discovered the facts giving rise to her claim before August 1, 1981.

Summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact. Our review is *de novo*. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The relevant facts are as follows. Mrs. Cipollone went to Dr. Alfred Lowy on July 23, 1981 for her regular medical checkup and x-ray. At that time, Dr. Lowy told her that he had discovered a spot on her lung. Mrs. Cipollone believed that this spot could be cancer caused by her smoking. She testified:

Q: When Dr. Lowy told you you had a spot on your lung, you got scared? A: Yes.

Q: You got scared because you knew what the significance of that could be, didn't you? A: Yes.

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Q: You were afraid that it could mean lung cancer? A: That's right.

Q: You knew that cigarette smoking had been connected with cancer as you told us? A: Yes.

Q: So you were afraid right then and there that you could have lung cancer from cigarette smoking, isn't that a fact? A: Right.

There is also ample evidence in the record from which the jury could conclude that Mrs. Cipollone knew that lung cancer was often caused by smoking.

Dr. Lowy did not tell Mrs. Cipollone that she might have lung cancer, but advised Mrs. Cipollone to see a lung specialist immediately. He recommended Dr. Seriff, whom Mrs. Cipollone went to see the next day. Dr. Seriff inquired about Mrs. Cipollone's smoking history and advised her, as he advises all of his patients, to stop smoking. Although Dr. Seriff formulated five differential diagnoses of her condition, one of which was primary lung cancer,<sup>48</sup> “[b]ased on the appearance of Mrs. Cipollone's x-rays,

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48. Dr. Seriff's affidavit states that “[m]y impression [on July 24, 1981] included the following possibilities:

- A. Resolving pneumonia;
- B. Primary lung cancer;
- C. Dog parasite (*dirofilaria immitis*)—giving a round area of inflammation;
- D. Carcinoid of the lung;
- E. Metastatic lung tumor—unlikely.”



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[he] initially believed she had a pneumonia or viral infection and treated her with antibiotic medications." Dr. Seriff did not tell her that there was a possibility that she had lung cancer, but upon leaving Dr. Seriff's office, Mrs. Cipollone quit smoking for the first time in twenty-four years.

Dr. Seriff saw Mrs. Cipollone for the second time on July 30, 1981. He later affirmed that "[t]here was no definite change in her x-ray as a result of the antibiotic medication, therefore I began to feel it was less likely that she had a slowly resolving pneumonia causing the shadow." He still did not inform her that she might have cancer; he told her that his "impression" was that she had a viral infection.

At this point, Mrs. Cipollone certainly did not know that she had lung cancer. However, by this time, she knew that she had a spot on her lung and believed that the spot could be cancer caused by smoking. Indeed, she must have feared that she might get lung cancer from smoking, having made repeated novenas to St. Jude over the years in the hopes of avoiding it. She could have asked Dr. Seriff whether she might have cancer. Thus, although we think that the question is close, we conclude that a reasonable jury could find that Mrs. Cipollone " 'by the exercise of reasonable diligence and intelligence should have discovered' " that she " 'may have [had] a basis for an actionable claim' " prior to July 30, 1981." *Vispiano*, 107 N.J. at 419, 527

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49. If July 30, 1981, the date of Mrs. Cipollone's second visit to Dr. Seriff, was the first day on which she should have known that she might have lung cancer, her suit was timely filed because July 30, 1983 was a Saturday. Under New Jersey law, the limitations period extends to the first day on which legal business can be transacted, which was August 1, 1983, the day she filed her suit.

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A.2d at 67.<sup>50</sup>

Mr. Cipollone argues, in essence, that if Dr. Seriff did not know with reasonable medical certainty by August 1, 1981 that Mrs. Cipollone had lung cancer from smoking, then it would be unreasonable to expect Mrs. Cipollone to know this information. The problem with this argument is that it misstates the applicable legal test. The statute of limitations did not start running when Mrs. Cipollone knew that she had cancer from smoking; it started to run when she, by exercising reasonable diligence, should have known that she *might* have had cancer from smoking. Accordingly the issue will have to be tried.

We do not, of course, hold that Mr. Cipollone's claims are barred by the two year statute of limitations. We hold only that a jury could conclude that they are and that summary judgment was therefore inappropriate on this issue.

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50. The *Vispiano* case provides the legal standard by which we judge this issue, but we do not find the facts or the language of that case particularly helpful. The touchstone of *Vispiano* is that the causal connection between toxic chemicals in the marketplace and cancer is not generally known. This is not so with smoking and cancer. Second, the language of *Vispiano* can be used to argue either side of this case. Although *Vispiano* found that medical confirmation was not necessary to start the statute running, 107 N.J. at 437, 527 A.2d at 77, the court also held that the statute could not start running until a plaintiff had "reasonable medical information" on which to base her belief that she might have a claim, *id.* at 435, 527 A.2d at 76. As of July 30, 1981, Mrs. Cipollone's knowledge that she might have lung cancer was based solely on her own suspicions after one visit to her general practitioner and one visit to a lung specialist who told her that she had a viral infection. However, taking into account the procedural posture of *Vispiano* (a reversal of summary judgment for the defendants), we read that case's ambiguous language to mean that these fact bound inquiries should be left to the jury.

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## XII. DID THE DISTRICT COURT ERR IN HOLDING THAT FEDERAL LAW PREEMPTED PLAINTIFF'S INTENTIONAL TORT CLAIMS?

Mr. Cipollone contends that the district court misconstrued our decision on the preemptive effect of the Federal Cigarette Labeling and Advertising Act ("Labeling Act") by holding that it preempts post-1965 intentional tort claims.<sup>51</sup> As amended, the Labeling Act states:

It is . . . the purpose of this chapter . . . to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

(1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331 (1982 & Supp. II 1984).

51. Mr. Cipollone also contends that our preemption decision was erroneous in order to preserve this issue for later review. The prior decision of this court is binding on this panel. See IOP Chapter 8C.

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In our preemption decision, we applied the doctrine of implied preemption and held that in light of section 1331's declaration of Congressional purpose

the Act preempts . . . state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes . . . . [W]here the success of a state law damage claim necessarily depends on the assertion that a party bore the duty to provide a warning to consumers, in addition to the warning Congress has required on cigarette packages, such claims are preempted as conflicting with the Act.

789 F.2d at 187.

On remand, the district court interpreted our preemption decision as barring the plaintiff's failure to warn, fraudulent misrepresentation, express warranty, and conspiracy to defraud claims to the extent that they sought to challenge the defendants' advertising, promotional, and public relations activities after January 1, 1966. See 649 F.Supp. at 668, 675. Mr. Cipollone contends on appeal that the district court erred in construing our preemption decision to stand for "the extreme and untenable proposition that all of plaintiff's claims based on intentional tort, fraud and misrepresentation were preempted for the post-1966 period." Cipollone Br. at 43. Mr. Cipollone contends that "there is obviously a logical distinction between failure to warn, which derives from a breach of existing duty, and intentional misrepresentation, which emanates from defendants' affirmative and gratuitous undertaking to misrepresent facts to the public"

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because “[l]iability imposed for intentional tort would not impose requirements on defendants with respect to the warnings contained on the label or in cigarette advertisements.” *Id.* at 44-45.

We disagree. Our prior decision stated an unequivocal holding that “the Act preempts those state law damage actions relating to smoking and health that challenge . . . the propriety of a party’s actions with respect to the advertising and promotion of cigarettes.” 789 F.2d at 187. Plaintiff’s intentional tort claim is founded on an allegation that defendants “intentionally, wil[l]fully, and wantonly, through their advertising, attempted to neutralize the [federally mandated] warnings that were given regarding the adverse effects of cigarette smoking.” 649 F.Supp. at 673 (quoting count 6 of plaintiff’s complaint). The plaintiff’s claim manifestly “challege[s] . . . the propriety” of the defendants’ “actions with respect to the advertising and promotion of cigarettes.” 789 F.2d at 187. The district court did not err in construing our preemption decision.<sup>52</sup>

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52. Lorillard argues in its brief that Mr. Cipollone’s risk-utility claim is also barred, impliedly, by the Labeling Act. As the language quoted in text indicates, however, the Labeling Act was meant to apply to cigarette companies’ actions with respect to the advertising and promotion of cigarettes. The risk-utility claim involves the basic decision to market the product. *See supra* Part IX. As we held in our earlier preemption decision, “we cannot say that the scheme created by the Act is ‘so pervasive’ or ‘so dominant’ as to eradicate all of the Cipollone’s claims. Nor are we persuaded that the object of the Act and the character of obligations imposed by it reveal a purpose to exert exclusive control over every aspect of the relationship between cigarettes and health.” 789 F.2d at 186. We are also mindful of federalism concerns, which mandate a presumption that “Congress did not intend to displace state law.” *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 2128-29, 68 L.Ed.2d 576 (1981). *See also Florida Lime & Avocado Growers, Inc., v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963). (“[F]ederal regulation of a field (Cont’d)

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## XIII. CONCLUSION

For the foregoing reasons we will:

(1) affirm the district court’s order dismissing plaintiff’s post-1965 failure to warn, express, warranty, and intentional tort claims against the defendants Liggett, Lorillard, and Philip Morris;

(2) reverse the district court’s order in favor of defendants Liggett, Lorillard, and Philip Morris, barring plaintiff’s generic risk-utility claim as a matter of law;

(3) reverse the district court’s judgment in favor of defendant, Liggett, and against plaintiff on plaintiff’s failure to warn claim;

(4) reverse the district court’s judgment in favor of plaintiff and against defendant, Liggett, on plaintiff’s express warranty claim;

(5) reverse the district court’s order granting plaintiff’s motion for summary judgment striking defendants’ affirmative defenses based on the statute of limitations; and

(6) reverse the district court’s order denying prejudgment interest; and

(7) remand for a new trial.

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of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.”). In light of this binding precedent, we cannot interpret the Labelling Act in such a way as to bar Mr. Cipollone’s risk-utility claim.



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GIBBONS, Chief Judge, concurring:

I join in the opinion of the court. I write separately to observe that the enormous complications which arose during the trial of this complex case are largely due to the interlocutory ruling of this court in *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir.1986), *cert. denied*, 484 U.S. 976, 108 S.Ct. 487, 98 L.Ed.2d 485 (1987), to the effect that some state law claims were preempted by the Federal Cigarette Label and Advertising Act (Labeling Act), 15 U.S.C. § 1331 (1982 & Supp. II, 1984). That ruling was made in a case in which this court granted leave to appeal pursuant to 28 U.S.C. § 1292(b) (1982). With the benefit of hindsight it seems clear to me that permission to appeal was improvidently granted. The case was legally and factually complicated, and our interlocutory ruling was made in the absence of a factual record which would have sharpened the issues and permitted a more informed application of the Labeling Act to the case. When a case involves multiple theories of liability, the application of which depends on what facts are found, it will rarely be true that an interlocutory appeal will "materially advance the ultimate termination of the litigation." Certainly that was not the effect of the interlocutory appeal in this case. The requirement in 28 U.S.C. § 1292(b) that the Court of Appeals give permission for a section 1292(b) appeal is intended to permit that court to avoid the kinds of indeterminate rulings which were made here and which do not materially advance anything but the lawyers' time meter.

More fundamentally, I believe that our interlocutory ruling on the preemptive effect of the Labeling Act, to the extent that we reached a definitive ruling, was wrong as a matter of law, and should be overruled by the court in banc. Had the district court proceeded to trial before presenting us with an opportunity to confuse things by an indeterminate and erroneous ruling on

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preemption, this case would today be far closer to resolution. Instead there will now be a new trial, and a new appeal, and the Supreme Court may still tell the parties that our views on preemption are wrong, and they should try again. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 108 S.Ct. 1704, 1712, 100 L.Ed.2d 158 (1988); *International Paper Co. v. Quелlette*, 479 U.S. 481, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984).

Thus, while I join in Part XII of the opinion of the court, I do so only because this panel is bound by what I believe to be an erroneous opinion of the Court.

**APPENDIX B — SUPREME COURT DENIAL OF  
CERTIORARI DATED JANUARY 12, 1987**

**CIPOLLONE, ANTONIO, ETC. v. LIGGETT GROUP, INC.  
*et al.*,**

**No. 86-563**

**January 12, 1987**

PRIOR HISTORY: C.A. 3d Cir.

REPORTED BELOW: 789 F.2d 181

DISPOSITION: Certiorari Denied.

JUDGES: Rehnquist, Brennan, White, Marshall, Blackmun,  
Stevens, O'Connor, Scalia

OPINION: The Petition for Writ of Certiorari is Denied.

**APPENDIX C — OPINION OF UNITED STATES COURT OF  
APPEALS, THIRD CIRCUIT DATED APRIL 7, 1986**

Antonio CIPOLLONE, individually and as Executor of the Estate  
of Rose D. Cipollone

v.

LIGGETT GROUP, INC., a Delaware Corporation; Philip Morris  
Incorporated, a Virginia Corporation and Loew's Theatres, Inc.,  
a New York Corporation.

Appeal of LIGGETT GROUP, INC.,  
Appellant in 85-5073

Appeal of LOEW'S THEATRES, INC.,  
Appellant in 85-5074

Nos. 85-5073, 85-5074.

United States Court of Appeals,  
Third Circuit

Argued Feb. 13, 1986.

Decided April 7, 1986.

As Amended April 18, 1986.

Rehearing and Rehearing In Banc  
Denied May 9, 1986.

Before HUNTER, SLOVITER, Circuit Judges, and GILES,\*  
District Judge.

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\* Honorable James T. Giles, United States District Judge for the District  
of Eastern Pennsylvania, sitting by designation.

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## OPINION OF THE COURT

JAMES HUNTER, III, Circuit Judge.

This case, before the court on the district court's certification pursuant to 28 U.S.C. § 1292(b) (1982), presents the question whether the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1340 (1982) (the "Act"), preempts any or all of the state common law claims brought by appellee Antonio Cipollone and his wife Rose in the district court. Several of the claims in the Cipollones' complaint concern the alleged failure of the defendants, Liggett Group, Inc., Philip Morris Incorporated, Loews Corporation, Loew's Theatres, Inc. ("Lorillard"), to provide an adequate warning of the dangers of the cigarettes that they manufactured and sold. Because these claims implicate the legislatively mandated warning provided in section 1333 of the Act, the answers of Liggett Group, Philip Morris, and Lorillard each included a defense based on the preemptive effect of the Act. The Cipollones responded by filing a motion to strike the preemption defenses. Lorillard, later joined by Philip Morris, then moved for judgment on the pleadings pursuant to Federal Rule Civil Procedure 12(c). Holding that the Act preempted none of the Cipollones' claims, the district court granted the Cipollones' motion to strike the defenses and denied the motion for judgment on the pleadings. *Cipollone v. Liggett Group, Inc.*, 593 F.Supp. 1146, 1171 (D.N.J. 1984). On January 21, 1984, this court granted appellants Lorillard and Liggett Group permission to appeal.<sup>1</sup> Because we disagree with the district court's

1. Liggett Group petitioned for leave to appeal only from the portion of the district court's order granting the Cipollones' motion to strike defenses. See Joint Appendix at A205. Lorillard sought leave to appeal from the entire

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conclusion concerning the preemptive effect of the Act, we will reverse the district court's grant of the motion to strike and will remand the case for further proceedings.

## I.

A. *The Complaint*

In their complaint, Rose and Antonio Cipollone alleged that Mrs. Cipollone developed lung cancer as a result of smoking cigarettes manufactured and sold by appellants. The complaint, which was originally filed on August 1, 1983, further averred that Mrs. Cipollone began smoking in 1942 and developed lung cancer as a result of her smoking. Mrs. Cipollone died in October 1984, but her husband has continued prosecuting this action, individually and as executor of his wife's estate. Mr. Cipollone is therefore the sole appellee in this case.

As observed by the district court, the fourteen-count complaint sets forth claims based on strict liability (Counts 2, 3, and 9), negligence (Counts 4 and 5), breach of warranty (Count 7), and intentional tort (Counts 6 and 8). The Cipollones claimed that the defendants' cigarettes were unsafe and defective (Count 2) and that defendants are subject to liability for their failure to warn of the hazards of cigarette smoking on the basis of negligence (Count 4) or strict liability (Count 3). In addition,

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order, which included a denial of its motion for judgment on the pleadings. See Joint Appendix at A203. Nevertheless, both appellants made clear in their reply brief and at oral argument that they did not challenge the district court's denial of Lorillard's motion for judgment on the pleadings. See Reply Brief of Appellants at 3; Transcript of Oral Argument at 7, 18. We will therefore consider only the district court's grant of the motion to strike.



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the Cipollones asserted, defendants negligently (Count 5) or intentionally (Count 6) advertised their products in a manner that neutralized the warnings actually provided, warnings made meaningless by the addiction created by cigarettes (Count 9). Finally, the complaint stated that the defendants ignored, failed to act upon, and conspired to deprive the public of medical and scientific data reflecting the dangers associated with cigarettes (Count 8).<sup>2</sup>

*B. The Federal Cigarette and Advertising Labeling Act*

The Federal Cigarette and Advertising Act, originally enacted in 1965, was a response to a growing awareness among members of federal as well as state government that cigarette smoking posed a significant health threat to Americans. The original Act required the following warning label on cigarette packages: "Caution: Cigarette Smoking May Be Hazardous to Your Health." 15 U.S.C. § 1333 (1970). Congress changed this warning, by amendment to the Act in 1969, to the following: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." 15 U.S.C. § 1333 (1976).<sup>3</sup> The Act, as amended

2. Counts 1 and 10 through 14 are not pertinent to this appeal.

3. In 1984, Congress replaced this warning with rotational warnings providing:

SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.

SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.

SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight.

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in 1970, expressly stated the policy behind the required warning:

It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331 (1982).<sup>4</sup>

(Cont'd)

SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

15 U.S.C. § 1333(a)(1) (Supp. II. 1984). The 1984 warning, however, has limited relevance here because the complaint contains no allegation that Mrs. Cipollone smoked cigarettes manufactured and sold by any defendant after 1981.

4. Congress amended paragraph one of section 1331 in 1984 by adding a reference to warning notices in cigarette advertisements. Paragraph one now

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The Act also contains a preemption provision, which provides that

(a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334 (1982). Confronted with this provision, the district court did not question that the Act prohibits state legislatures from requiring a warning on cigarette packages that alters that provided in section 1333. Nevertheless, after a comprehensive analysis of the Act, the court concluded that section 1334 does not preempt state common law claims such as those that the Cipollones have asserted.

## II.

## A. Preemption Principles

The United States Supreme Court has identified several principles for ascertaining congressional intent to preempt state

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provides: "(1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes. . . ." 15 U.S.C. § 1331(1) (Supp. II 1984).

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authority. To begin, Congress may preempt state law by express statement. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977). Without the aid of express language, a court may find intent to preempt in two general ways. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984). First, a court may determine that Congress intended "to occupy a field" in a given area

because "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose."

*Fidelity Federal Savings & Loan Association v. De la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)). Second, in those instances where Congress has not wholly superceded state regulation in a specific area, state law is preempted "to the extent that it actually conflicts with federal law." *Pacific Gas & Electric Co. v. Energy Resources Conservation & Development Commission*, 461 U.S. 190, 204, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1982). The Court has stated that such conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217-18, 10 L.Ed.2d 248

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(1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). Finally, in applying these principles, a court must be mindful of the overriding presumption that "Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 2129, 68 L.Ed.2d 576 (1981); see also *Rice*, 331 U.S. at 230, 67 S.Ct. at 1152.

## B. Express Preemption

In applying these principles to the statutory scheme at issue here, we first express our agreement with the district court's conclusion that section 1334 does not provide for express preemption of the Cipollones' state common law claims. See *Cipollone*, 593 F.Supp. at 1154-55; accord *Roysdon v. R.J. Reynolds Tobacco Co.*, 623 F.Supp. 1189, 1190 (E.D.Tenn. 1985); *Roysdon v. R.J. Reynolds*, No. 3-84-606, slip op. at 2 (E.D.Tenn. Dec. 11, 1985). Because we are constrained by the presumption against preemption, we cannot say that the language of section 1334 clearly encompasses state common law. We find support for this determination in Congress's failure to include state common law explicitly within section 1334, as it has in numerous other statutes.<sup>5</sup> Indeed, in the absence of a preemption provision

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5. Examples of statutes that include a preemption provision explicitly encompassing state common law include 12 U.S.C. §§ 1715z-17(d), 1715z-18(e) (Supp. II 1984) (Domestic Housing and International Recovery and Financial Stability Act); 17 U.S.C. § 301(a) (Copyright Act of 1976); and 29 U.S.C. § 1144(a), (c)(1) (1982) (Employee Retirement Income Security Act of 1974).

It should be noted that just as Congress could have included a reference to preemption of state common law in section 1334, it also could have included

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encompassing state common law, the Supreme Court has relied generally on principles of implied preemption in evaluating whether a statutory scheme preempts state common law. See, e.g., *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984); *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981). Accordingly, we turn to examining whether congressional intent to preempt the Cipollones' claims may be inferred under the two general principles of implied preemption.

## C. Implied Preemption

In pressing their implied preemption arguments in this appeal, each side relies extensively on the legislative history of the Act. As is often the case with legislative history, both sides have succeeded in gleaning passages that bolster their contrary positions. Although we find the legislative history to the Act informative, no materials have come to our attention that we deem wholly dispositive of the issue before us. Even more important, we find the language of the statute itself a sufficiently clear expression of congressional intent without resort to the Act's legislative history. See *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984); *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 26, 97 S.Ct. 926, 941, 51 L.Ed.2d 124 (1977).

Under the principles of implied preemption, we must first

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a "savings clause" explicitly preserving the continued vitality of state common law, such as that in the Occupational Safety and Health Act of 1970, 29 U.S.C. § 653(b)(4) (1982). Thus, lack of reference to preemption of state common law in section 1334 has significance only because of the presumption against preemption.



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determine whether Congress intended "to occupy the field" relating to cigarettes and health to the exclusion of state law product liability actions such as the Cipollones. Our examination of the Act leads us to agree with the district court's statements that "Congress . . . intended to occupy *a* field" and "indicated this intent as clearly as it knew how." *Cipollone*, 593 F.Supp. at 1164 (emphasis in original). Not only did Congress use sweeping language in describing the preemptive effect of the Act in section 1334, but it expressed its desire in section 1331 to establish "a comprehensive Federal program" in order to avoid "diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." See *Palmer v. Liggett & Myers Tobacco, Inc.*, 635 F.Supp. 392 (D.Mass. 1984) (Congress has preempted field with respect to cigarette labeling).

In determining the scope of this field, we observe that the Cipollones' tort action concerns rights and remedies traditionally defined solely by state law. We therefore must adopt a restrained view in evaluating whether Congress intended to supercede entirely private rights of action such as those at issue here. See *Rice*, 331 U.S. at 230, 67 S.Ct. at 1152; *Cipollone*, 593 F.Supp. at 1165-66; see also *Silkwood*, 104 S.Ct. at 623-24; *Florida Avocado Growers*, 373 U.S. at 143-44, 83 S.Ct. at 1211. In light of this constraint, we cannot say that the scheme created by the Act is "so pervasive" or the federal interest involved "so dominant" as to eradicate all of the Cipollones' claims. Nor are we persuaded that the object of the Act and the character of obligations imposed by it reveal a purpose to exert exclusive control over every aspect of the relationship between cigarettes and health. See *Banzhaf v. F.C.C.*, 405 F.2d 1082, 1089-91 (D.C.Cir. 1968), *cert. denied*, 396 U.S. 842, 90 S.Ct. 50, 24 L.Ed.2d 93 (1969); see also *Southern Railway Co. v. Railroad Commission of Indiana*, 236 U.S. 439, 446-48,

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35 S.Ct. 304, 305-06, 59 L.Ed. 661 (1915). Thus, we look to the extent to which the Cipollones' state law claims "actually conflict" with the Act to ascertain whether they are preempted.

The test enunciated by this court for addressing a potential conflict between state and federal law requires us "to examine first the purposes of the federal law and second the effect of the operation of the state law on these purposes." *Finberg v. Sullivan*, 634 F.2d 50, 63 (3d Cir. 1980) (in banc) (citing *Perez v. Campbell*, 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971)). As mentioned above, Congress has provided us with an explicit statement of the Act's purposes in section 1331. That statement reveals that the Act represents a carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of national economy. See *Banzhaf*, 405 F.2d at 1090. Moreover, the preemption provision of section 1334, read together with section 1331, makes clear Congress's determination that this balance would be upset by either a requirement of a warning other than that prescribed in section 1333 or a requirement or prohibition based on smoking and health "with respect to the advertising or promotion" of cigarettes. See 15 U.S.C. § 1334.

Having identified the purposes of the Act, we now must evaluate the effect of the operation of state common law claims on these purposes. In so doing, we accept the appellants' assertion that the duties imposed through state common law damage actions have the effect of requirements that are capable of creating "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." See *Hines*, 312 U.S. at 67, 61 S.Ct. at 404; see also *Dawson v. Chrysler Corp.*, 630 F.2d 950, 962 (3d Cir. 1980) (liability under common law has the effect of imposing requirements), *cert. denied*, 450 U.S. 959, 101 S.Ct.

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1418, 67 L.Ed.2d 383 (1981). As the appellants point out, several Supreme Court opinions reflect recognition of the regulatory effect of state law damage claims and their potential for frustrating congressional objectives. See, e.g., *Fidelity*, 458 U.S. at 156-59, 102 S.Ct. at 3024-25; *Chicago & North Western Transportation Co.*, 450 U.S. at 324-25, 101 S.Ct. at 1133-34; *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247, 79 S.Ct. 773, 780, 3 L.Ed.2d 775 (1959).<sup>6</sup> Applying this principle, we conclude that claims relating to smoking and health that result in liability for noncompliance with warning, advertisement, and promotion obligations other than those prescribed in the Act have the effect of tipping the Act's balance of purposes and therefore actually conflict with the Act.

Based on the foregoing, we hold that the Act preempts those state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages<sup>7</sup> or the propriety of a party's actions with respect to the advertising and promotion of cigarettes. We further hold that where the success of a state law damage claim necessarily depends on the assertion that a party bore the duty to provide a warning to consumers in addition to the warning Congress has required on cigarette packages, such claims are preempted as conflicting with the Act.

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6. The district court noted that *Garmon* involved claims based on state statutes, rather than state common law. This distinction does not undermine the significance of *Garmon*. As the appellants argue, the central inquiry should be whether a state statute or common law rule providing for civil liability is regulatory in its effect. The *Garmon* Court ruled that a claim for compensation has a regulatory nature and therefore may be preempted by a federal regulatory scheme. *Garmon*, 359 U.S. at 247-48, 79 S.Ct. at 780-81.

7. *Accord Roysdon*, at 1190-91 (1985); *Roysdon*, slip op. at 3 (Dec. 11, 1985).

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As appellants' counsel conceded at oral argument, it is not necessary at this stage of the litigation for us to identify which of the Cipollones' claims are preempted by the Act. Under 28 U.S.C. § 1292(b), we are obliged to address the order that was certified rather than the controlling question of law framed by the district court.<sup>8</sup> *Johnson v. Alldredge*, 488 F.2d 820, 822-23 (3d Cir. 1973), *cert. denied*, 419 U.S. 882, 95 S.Ct. 148, 42 L.Ed.2d 122 (1974); see, e.g., *Murphy v. Heppenstall Co.*, 635 F.2d 233, 235 n. 1 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142, 102 S.Ct. 999, 71 L.Ed.2d 293 (1982). The district court's statement of the controlling issue appears to call for a definitive ruling on each of the Cipollones' claims. Nevertheless, we need only decide whether the district court's ruling striking appellants' preemption defenses should be affirmed or reversed.<sup>9</sup> Two principles counsel

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8. Section 1292(b) provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

9. In *Johnson*, we stated that section 1292(b) "does not speak of the court of appeals deciding a question certified by the district court. . . . Since under the clear terms of section 1292(b), we are called upon not to answer the question certified but to decide an appeal, we do not find ourselves bound by the District Judge's statement of the issue." 488 F.2d at 822-23.

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us to take such an approach. First, a court should avoid a holding of preemption that is premised on a merely potential conflict between state and federal law. *See Rice v. Norman Williams Co.*, 458 U.S. 654, 659, 102 S.Ct. 3294, 3298, 73 L.Ed.2d 1042 (1982). In addition, a court should not grant a motion to strike a defense unless the insufficiency of the defense is "clearly apparent." *See May Department Stores Co. v. First Hartford Corp.*, 435 F.Supp. 849, 855 (D.Conn. 1977); Wright & Miller, Federal Practice and Procedure § 1381, at 802 (1969). The underpinning of this principle rests on a concern that a court should restrain from evaluating the merits of a defense where, as here, the factual background for a case is largely undeveloped. *See id.* at 800-02.

Mindful of both of these principles, we deem it appropriate to reverse the order of the district court and remand the case for further development of the claims and theories of the parties. The district court will then be in a position to make informed and definitive rulings on which claims then in contention are preempted.

## III.

For the foregoing reasons, we will reverse the order of the district court to the extent that it granted the Cipollones' motion to strike appellants' preemption defenses. We will also remand the case for further proceedings consistent with this opinion.

**APPENDIX D — OPINION OF THE UNITED STATES  
DISTRICT COURT, DISTRICT OF NEW JERSEY DATED  
SEPTEMBER 20, 1984**

Rose CIPOLLONE and Antonio Cipollone,

Plaintiffs,

v.

LIGGETT GROUP, INC., Philip Morris Incorporated, and  
Loew's Theatres, Inc.,

Defendants.

Civ. A. No. 83-2864.

United States District Court,  
D. New Jersey.

Sept. 20, 1984.

OPINION

SAROKIN, District Judge.

INTRODUCTION

Despite the growing evidence that cigarette smoking is indeed hazardous to one's health, as recognized in the warning mandated by Congress, a legislative decision has been reached not to prohibit it. Although that decision may be due in some measure to the ongoing medical dispute as to the risks involved, it is predicated to a large extent on economic considerations and the apparent willingness of millions of persons to continue smoking despite the known and unknown risks. Congress, in order to avoid another



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Prohibition, has decided to permit the manufacture and sale of cigarettes to continue, but has attempted to assuage its critics by regulating the industry and requiring it to affix a warning to each package sold.

The legislative history of the Act here involved reflects a candid concern for the economy of the entire country if cigarette manufacturing were curtailed or eliminated. One would hope that those fiscal considerations were weighed against the costs of illness and death caused by cigarette smoking as well as the moral responsibility of protecting the young and future generations who have not yet begun to smoke.

In any event, that branch of the government which is charged with the responsibility of protecting the health and welfare of our society has determined that the cigarette industry shall be permitted to flourish after consideration of the consequences of permitting it to do so. This case presents the issue of whether cigarette manufacturers can be subjected to tort liability, if they have complied with the federal warning requirement: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." In effect, the cigarette industry argues that compliance immunizes it from liability to anyone who has chosen to smoke cigarettes notwithstanding the warning, that the federal legislation has created an irrebutable presumption that the risk of injury has been assumed by the consumer. This court rejects that contention.

The clear purpose of the federal legislation was to establish a uniform warning which would prevail throughout the country. By so doing, cigarette manufacturers would not be subjected to varying requirements from state to state. However, the existence of the present federally mandated warning does not prevent an

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individual from claiming that the risks of smoking are greater than the warning indicates, and that therefore such warning is inadequate. The court recognizes that it will be extremely difficult for a plaintiff to prove that the present warning is inadequate to inform of the dangers, whatever they may be. However, the difficulty of proof cannot preclude the opportunity to be heard, and affording that opportunity will not undermine the purposes of the Act.

Defendants' argument that the statute was intended to foreclose such claims is not borne out by either the language or legislative history of the Act. Simply stated, defendants contend that a cigarette manufacturer who utilizes the federal warning cannot be held liable in tort. Just as simply, that statement could have been incorporated into the statute, if that were the intention, but it was not. Before this court or any other court so cavalierly rejects fundamental principles of the common law, it should demand a much more definitive statement from Congress.

The information regarding disease from smoking is growing. Medical and scientific opinion is divided. The impact on the economy is a factor considered by Congress and may well have caused a compromise in the content of the warning. Even Congress, which once declared that cigarette smoking "*may be*" hazardous, now finds that it "*is*" hazardous. This court believes that an individual injured while the warning was that cigarette smoking "*may be* hazardous to your health" would have been able to prevail if he or she was able to prove that "cigarette smoking is [was] hazardous to your health." Today even some greater warning may be appropriate, and variations are now being considered. In any event, no one should be deprived by virtue of congressional compromise of the opportunity of proving that contention absent a clear showing that Congress intended that they be so precluded.

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There are further claims asserted by plaintiff which likewise deserve their day in court. Thus, even if utilizing the federal warning relieves cigarette manufacturers of liability for failure to warn, the question remains whether they can be held liable for collateral efforts to neutralize or negate the effects of the warning. Efforts to convince the public that the risks do not exist or that they are minimal or unsupported by medical or scientific data may in and of themselves give rise to a cause of action; indeed they may even constitute a violation of the very statute which defendants brandish as a shield. Whether the present federally mandated warning is adequate and whether defendants have wrongfully attempted to neutralize that warning are thus issues which survive the federal statute and are not preempted by it.

Certainly, as in all such cases, the federal standard is strong evidence of the adequacy of the warning, but it is not conclusive. The federal government regulates many industries, not least of which is the ethical drug industry. The fact that the safety, efficacy, literature and warnings pertaining to drugs are reviewed and approved by the government pursuant to the authority of Congress has never relieved drug manufacturers of liability in tort if the risks exceeded the warnings given. These cases, among others, recognize that even the federal government is fallible. The fact that it finds a product safe or a warning adequate does not necessarily make it so. The private citizen should not be deprived of the opportunity to establish such fallibility and vindicate his or her rights to recover for injuries sustained if supported by competent proofs.

### THE COMPLAINT

Plaintiff Rose Cipollone is dying of lung cancer. She brings this products liability action against three cigarette companies,

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alleging that they are responsible for her current state. Her fourteen-count complaint sounds in strict liability (Counts 2, 3 and 9), negligence (Counts 4 and 5), intentional tort (Counts 6 and 8) and breach of warranty (Count 7). She claims that defendants have produced an unsafe and defective product (Counts 2 and 7), the risk of which outweighs its utility (Count 2), but have negligently (Count 4) or intentionally (Count 8) failed adequately to warn consumers of the hazards associated with cigarette smoking. *See also* Count 3 (strict liability for failure to warn). Indeed, she contends, defendants have negligently (Count 5) or intentionally (Count 6) advertised their products so as to neutralize and render ineffective those warnings actually given, warnings which are made meaningless in any event by the addictive qualities of cigarettes (Count 9).<sup>1</sup>

Defendants have each answered, asserting as an affirmative defense, *inter alia*, that plaintiff's claims are preempted by the Federal Cigarette Labeling Act, as amended by the Public Health Cigarette Smoking Act, 15 U.S.C. § 1331 *et seq.* Plaintiff has moved to strike such defense. With the cross-motion of defendant Loew's Theatres, Inc. for judgment on the pleadings, the parties are now before the court on this difficult issue.

### *The Act*

### *The Federal Cigarette Labeling and Advertising Act*

Originally enacted in 1965, the Federal Cigarette Labeling and Advertising Act ("the Act") followed a report of the Surgeon

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1. Counts 10 through 13 contain allegations concerning the identities of various defendants. Count 14 comprises plaintiff Antonio Cipollone's claim for "loss of comfort, companionship and consortium. . ."

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General of the United States concluding that cigarette smoking comprised a significant health hazard to Americans, warranting remedial action by Congress. As amended in 1970, the Act sets forth the following statement of policy:

It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331. In order to effectuate these purposes, Congress provided that

It shall be unlawful for any person to manufacture, import, or package for sale or distribution within the United States any cigarettes the package of which fails to bear the following statement: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." Such statement shall be located in a

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conspicuous place on every cigarette package, and shall appear in conspicuous and legible type in contrast by typograph, layout, or color with other printed matter on the package.

15 U.S.C. § 1333. The Federal Trade Commission was given the authority to regulate cigarette advertising, 15 U.S.C. §§ 1335-36, and the district courts jurisdiction to enjoin violations of the Act. 15 U.S.C. § 1339. A minimal criminal penalty was also provided. 15 U.S.C. § 1338.

Congress included within the Act a provision regarding preemption, and it is this provision which is now before the court for interpretation and application. Congress stated:

(a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labelled in conformity with the provisions of this chapter.

15 U.S.C. § 1334. Plaintiff concedes that this section prohibits states from regulating cigarette packaging, and cigarette advertising by, for example, requiring a warning other than that set forth in the Act. She argues, however, that this provision does not preempt state common law claims such as those asserted by plaintiff.



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## Preemption

"The Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2. From this simple mandate springs the doctrine of preemption, as first stated by Chief Justice Marshall in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824):

The nullity of any act, inconsistent with the Constitution, is produced by the declaration, that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but though enacted in the execution of acknowledged state powers, interfere with, or are contrary to, the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every case, the act of Congress, or the treaty, is supreme; and the law of the state though enacted in the exercise of powers not controverted, must yield to it.

22 U.S. at 210-11. See also *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 152, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982) (preemption doctrine has its roots in the Supremacy Clause of the Constitution).

From *Gibbons v. Ogden* on, courts, have struggled with the

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question of whether federal law preempts state action. The problem is "largely one of statutory construction," and therefore "cannot be reduced to general formulas." L. Tribe, *American Constitutional Law* at 377 (1978). However, certain principles are clear. First, federal law may expressly preempt state law. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1983), citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977). Absent express preemption, federal law may nonetheless have an implied preemptive effect if Congress so intended, and indicated such intent by "occupying the field" in a particular area. Thus

Congress' intent to supercede state law altogether may be found from a "scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it," "because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the objects sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose."

*Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, *supra*, 458 U.S. at 153, 102 S.Ct. at 3022; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947); cited in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, *supra*, 103 S.Ct. at 1722. And, even if Congress has not entirely displaced state regulation over the matter in question, state law may nonetheless be preempted to the extent that it actually conflicts

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with the federal law. Such conflict occurs where "compliance with both federal and state regulations is a physical possibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). See generally *Silkwood v. Kerr-McGee Corp.*, \_\_\_ U.S. \_\_\_, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984); *Pacific Gas & Electric Co.*, *supra*, 103 S.Ct. at 1722; *Fidelity Federal Saving & Loan Ass'n*, *supra*, 458 U.S. at 153, 102 S.Ct. at 3022. Together, these principles seek to accommodate the competing interests engendered by appropriate national regulation and the legitimate exercise of state power. Underlying any discussion of preemption, therefore, is the structural foundation of a federal system, in which state and federal regulation must co-exist. The preservation of that system requires a presumption "that Congress did not intend to displace state law", *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 2129, 68 L.Ed.2d 576 (1981), quoting *Rice v. Sante Fe Elevator Corp.*, *supra*, 331 U.S. at 230, 67 S.Ct. at 1152; "preemption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.' " *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634, 101 S.Ct. 2946, 2962, 69 L.Ed.2d 884 (1981), quoting *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317, 101 S.Ct. 1124, 1130, 67 L.Ed.2d 258 (1981); *Florida Lime & Avocado Growers*, *supra*, 373 U.S. at 142, 83 S.Ct. at 1217. Moreover, state law should be suspended "only to the extent of actual conflict with the scheme of federal regulation." *In re Quanta Resources Corp.*, 739 F.2d 912 at 915 (3d Cir. 1984), citing *Stellwagen v. Clum*, 245 U.S. 605, 613, 38 S.Ct. 215, 217, 62 L.Ed. 507 (1918).

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Here, the preemption issues arises in the context of a claim that the Federal Cigarette Labeling Act preempts the state common law claims asserted by plaintiff. There is no question, as defendants argue, that common law is as susceptible of preemption as are state statutes or regulations for, as the Supreme Court has stated,

regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

*San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247, 79 S.Ct. 773, 780, 3 L.Ed.2d 775 (1959).<sup>2</sup> See also *Sperry v. Florida*, 373 U.S. 379, 403, 83 S.Ct. 1322, 1335, 10 L.Ed.2d 428 (1963) ("The authority of Congress is no less when the state power it displaces would otherwise have been exercised by the state judiciary rather than by the state legislature.") Hence, courts have held that federal statutes have preempted state common law claims in many areas. See e.g., *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 582-84, 101 S.Ct. 2925, 2932-33, 69 L.Ed.2d 856 (1981) (Natural Gas Act preempts calculation of damages under state common law of contract); *Kalo Brick*, *supra*, 450 U.S.

2. It should be noted that the *Garmon* case did not involve the preemption of state common law claims, since the state courts had relied on various state statutory provisions in reaching the applicable decisions. 359 U.S. at 239, 79 S.Ct. at 776.



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at 317-32, 101 S.Ct. at 1130-37 (Interstate Commerce Act regulation of abandonment of service preempts state tort claim); *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264, 270-73, 94 S.Ct. 2770, 2774-75, 41 L.Ed.2d 745 (1974) (NLRA preempts certain state libel claims); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229-33, 84 S.Ct. 784, 787-89, 11 L.Ed.2d 661 (1964) (federal patent and copyright laws preempt state actions for unfair competition, at least in part); *Hodges v. Atchison, Topeka & Santa Fe Railway Co.*, 728 F.2d 414, 416-17 (10th Cir. 1984) (Railway Labor Act preempts state common law claim for wrongful discharge); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195, 199-201 (2d Cir. 1983) (Copyright Act preempts state common law claims for conversion and interference with contract); *Howard v. Uniroyal, Inc.*, 719 F.2d 1552 (11th Cir. 1983) (Rehabilitation Act of 1973 preempts state contract claim); *Viestenz v. Fleming Companies, Inc.*, 681 F.2d 699, 701-04 (10th Cir.), *cert. denied*, 459 U.S. 972, 103 S.Ct. 303, 74 L.Ed.2d 284 (1982) (National Labor Relations Act preempts state actions for wrongful discharge and intentional infliction of emotional distress arising out of labor context); *Hasbrouck v. Sheet Metal Workers Local 232*, 586 F.2d 691, 694 (9th Cir. 1978) (National Labor Relations Act preempts state claims of defamation and business disparagement); *City of Chicago v. General Motors Corp.*, 467 F.2d 1262, 1265 (7th Cir. 1972) (National Emissions Standard Act preempts state products liability based upon automobile pollution); *Zittrouer v. Uarco Inc. Group Benefit Plan*, 582 F.Supp. 1471, 1477 (N.D. Ga. 1984) (ERISA preempts state tort claim for bad faith handling of benefits claim); *Delisi v. United Parcel Service, Inc.*, 580 F.Supp. 1572 (ERISA and NLRA preempt state common law claim for wrongful discharge); *Salcedo v. Norfolk & Western Railway Co.*, 572 F.Supp. 286, 288 (E.D. Mich. 1982) (Railway Labor Act preempts state law claims for emotional distress and intentional interference

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with contractual relations); *Videotronics, Inc. v. Bend Electronics*, 564 F.Supp. 1471, 1476-77 (D.Nev. 1983) (Copyright Act preempts state common law claims of misappropriation and trade secret violations); *Shaw v. International Ass'n of Machinists & Aerospace Workers Pension Fund*, 563 F.Supp. 653, 658-59 (C.D. Calif. 1983) (ERISA preempts certain state common law claims for breach of contract), citing *Lafferty v. Solar Turbines International*, 666 F.2d 408 (9th Cir. 1982); *Huth v. B.P. Oil, Inc.*, 555 F.Supp. 191, 194 (D.Md. 1983) (Petroleum Marketing Practices Act preempts conflicting state common law claims), citing, *e.g.*, *Meyer v. Amerada Hess Corp.*, 541 F.Supp. 321, 332 (D.N.J. 1982) (same); *State of North Dakota v. Merchants National Bank and Trust Co.*, 466 F.Supp. 953 (D.N.D. 1979) (federal banking law preempts state common law of unfair competition). *See also City of Milwaukee v. Illinois*, 451 U.S. 304, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981) (federal statute preempts federal common law). However, there remains a presumption against the preemption of state common law, in particular, since such law is often the result of many generations of judicial development, *see, e.g., Iconco v. Jensen Construction Co.*, 622 F.2d 1291, 1296 (8th Cir. 1980), and, more importantly, concerns areas "traditionally regarded as within the scope of state superintendence." *Florida Avocado Growers v. Paul*, *supra*, 373 U.S. at 144, 83 S.Ct. at 1218. *See also Pacific Gas & Electric Co.*, *supra*, 103 S.Ct. at 1723, quoting *Rice v. Santa Fe Elevator Corp.*, *supra*, 331 U.S. at 230, 67 S.Ct. at 1152 ("Congress legislated here in a field which the States have traditionally occupied . . . so we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."); *Milwaukee v. Illinois*, *supra*, 451 U.S. at 316-17, 101 S.Ct. at 1792, citing *Jones v. Rath Packing Co.*, 430 U.S. at 525, 97 S.Ct. at 1309. *See generally* Tribe, *supra*, § 6-25 at 385-86. Torts, such as those alleged here, are precisely



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the sort of legal action that falls within the scope of a state's historical and prototypical powers. See, e.g., *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1542 (D.C. Cir. 1984); *Feldman v. Lederle Laboratories*, 97 N.J. 429, 462, 479 A.2d 374 (Sup.Ct. of N.J. 1984).<sup>3</sup> The presumption against preemption of these causes of action is strengthened where preemption would leave a putative plaintiff without adequate remedy for violation of his or her state created rights. See *Silkwood v. Kerr-McGee Corp.*, *supra*, 104 S.Ct. at 626. See also *id.* at 629 ("it is inconceivable that Congress

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3. The cases involving labor law are instructive on this point. Generally, labor relations are a federal concern and, state laws conflicting with the NLRA are preempted. See, e.g., *San Diego Building Trades Council v. Garmon*, *supra*, 359 U.S. at 239-45, 79 S.Ct. at 776-79. However, the Supreme Court has carefully tailored the resulting preemption doctrine to take cognizance of the activities in which states have a "compelling . . . interest," *id.* at 247, 79 S.Ct. at 781, or which concern matters "so deeply rooted in local feeling or responsibility that, in the absence of compelling Congressional direction, we could not infer that Congress had deprived the States of the power to act." *Id.* at 244, 79 S.Ct. at 779. Hence, for example, the Court has carved out exceptions to the general preemption doctrine for "conduct marked by violence and imminent threats to the public order," *id.* at 247, 79 S.Ct. at 781 (citing cases) for certain defamation actions, *Old Dominion Branch No. 496, National Ass'n of Letter Carriers*, *supra*, 418 U.S. at 271-73, 94 S.Ct. 2770 at 2774-75, 41 L.Ed.2d 745, citing *Linn v. Plant Guard Workers*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966) (allowing state defamation actions to the extent that published statements are made with knowledge of their falsity or reckless disregard for the truth), for actions for intentional infliction of emotion distress, *Farmer v. United Brotherhood of Carpenters & Joiners of America, Local 25*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977), and for trespass actions. *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978). In each of these cases, the Court found the conduct addressed by state law to be beyond the scope of the NLRA, and thus of only peripheral concern to federal purposes, to be of a deeply felt concern of the states, and to pose little risk of state interference with the Act. See e.g., *Farmer*, *supra*, 430 U.S. at 298, 97 S.Ct. at 1062.

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intended to leave victims with no remedy at all" (Blackmun, J., dissenting). However, any application of these principles inevitably requires the interpretation of a statute. See Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 Stanf.L.Rev. 208, 208-210 (1959). It is to such interpretation that the court now turns.

## DISCUSSION

## A. Express Preemption

The court first addresses the question of whether the common law causes of action here asserted by plaintiff are expressly preempted by the Act. Congress has preempted certain state action by the terms of 15 U.S.C. § 1334, which is entitled "Preemption," and does not allow any "statement relating to smoking and health, other than the statement required by Section 1333 . . ." to be "required on any cigarette package." 15 U.S.C. § 1334(a) (emphasis added). It likewise does not permit any "requirement or prohibition based on smoking or health" to be "imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b) (emphasis added). Indeed, plaintiff concedes that the Act "precludes state and government regulation of labeling and advertising." Plaintiff's Brief (2/24/84) at 4. See also *Id.* at 8, 18, 29. Nonetheless she argues that her claims, should they succeed, will not constitute regulation of cigarette labeling or advertising, but merely compensation for the harmful effects of smoking and thus, that they are not preempted. In support of this argument is the language of the statute, which does not, in so many words, prohibit suits against cigarette companies based upon state common law. Plaintiff argues, and the court agrees, that had Congress wished

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to extinguish state causes of action, it could easily have done so.

Defendants contend that, as state tort law has a clear regulatory effect, it falls within the language of § 1334, and indeed might well act so as to undermine the Act's purposes of creating uniformity of effective cigarette labeling and advertising, and of assuring the continued viability of the tobacco industry. Like plaintiff, defendants argue based upon what does not appear in the Act, stating that had Congress wished to allow state common law causes of action to survive, it would have included a savings clause. Indeed, defendants complement their superb briefing with a thorough Appendix, including examples of fifty such clauses appearing in federal acts.

The court, however, is persuaded that, on its face, the Act does not explicitly preempt state common law claims, and that determination of the question of whether preemption was intended requires an analysis of the legislative history of the Act. It is true, as defendants argue, that Congress could have included a savings clause within the Act, as it did, for example, in the Occupational Safety and Health Act of 1970, 29 U.S.C. § 653(b)(4). It did not. Nor, however, did Congress explicitly include state common law within the Act's preemption provision, as it did, for example, in the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(c)(1).<sup>4</sup> The question is thus not one that can be

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4. ERISA's preemption clause states that

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title. . .

(Cont'd)

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resolved through examining the expansiveness of the preemption

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(Cont'd)

29 U.S.C. § 1144(a). Later, it makes clear that

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. . .

29 U.S.C. § 1144(c)(1) (emphasis added). See generally *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1214-16 (8th Cir.), cert. denied, 454 U.S. 968, 102 S.Ct. 512, 70 L.Ed.2d 384 (1981). Similar provisions, specifically preempting state common law appear in other statutes as well, pertaining to both substantive, see, e.g., 12 U.S.C. § 1715z-17(d), 1715z-18(c); 12 U.S.C. § 2259; 17 U.S.C. § 301(a); 25 U.S.C. §§ 1723(a)(1), 1753(d) (preemption of common law fraud claims only), and procedural provisions. See, e.g., 5 U.S.C. §§ 7118(a)(6), 8124(b)(2); 22 U.S.C. § 4116(f); 33 U.S.C. § 923(a); 42 U.S.C. § 1988 (state common law procedures may be used in criminal cases to the extent consistent with the Constitution and laws of the United States). See also 25 U.S.C. § 1722(d) (defining "laws of the State" as including common law for purposes of the Maine Indian Claims Settlement Act of 1980). Hence, it is clear that, just as Congress could easily have provided a savings clause, so could it easily have explicitly preempted state common law. Indeed, in certain cases it did both. See, e.g., 17 U.S.C. § 301; 25 U.S.C. § 1723(a)(1), 1753(d). Here, it did neither.

Moreover, to argue from the non-existence of a savings clause is not particularly persuasive, and flies in the face of the principle that "a statute should not be considered in derogation of the common law unless it expressly so states or the result is imperatively required from the nature of the enactment." *Bauers v. Heisel*, 361 F.2d 581, 587 (3d Cir. 1966) (en banc), cert. denied, 386 U.S. 1021, 87 S.Ct. 1367, 18 L.Ed.2d 457 (1967). See also *Checkrite Petroleum, Inc. v. Amoco Oil Co.*, 678 F.2d 5, 8 (2d Cir. 1982) (citing cases). Indeed, one scholar has pointed out that the proper negative inference in cases such as these is precisely the opposite of that which defendants seek to have the court draw: "Because statutes in derogation of the common law are disfavored, the maxim [*of expressio unius est exclusio alterius*] has been extensively employed to avoid repeal of the common law . . ." Sands, 2A *Sutherland Statutory Construction* § 47.24, at 128 (1973) (emphasis added).



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provision of the Act, on its face.<sup>5</sup>

Nor does the court find it sufficiently clear that state tort law is encompassed within the terms "requirement or prohibition" utilized in § 1334 to be *expressly* preempted by the Act. Whether or not the effect of such New Jersey tort law is a conflict with the Act rendering such state law *impliedly* preempted, a matter discussed in some detail, *infra* at 1166-1170, the court cannot find the terms "requirement or prohibition" expressly to abolish common law remedies such as those sought by plaintiff. It is true

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5. Indeed, even where savings clauses appear, they have often been narrowly construed so as to effectuate the purposes of a particular congressional enactment. See, e.g., *People of the State of Illinois v. City of Milwaukee*, 731 F.2d 403, 413-14 (7th Cir. 1984) (narrowly construing savings clause in Federal Water Pollution Control Act); *American Progressive Life and Health Insurance Co. of New York v. Corcoran*, 715 F.2d 784, 786-87 (2d Cir. 1983) (narrowly construing savings clause regarding insurance in ERISA); *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1084 (9th Cir. 1979) (narrowly construing savings clause in Mineral Lands Leasing Act); *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1274-81 (5th Cir. 1978) (narrowly construing jurisdictional savings clause in Securities Exchange Act of 1934); *National Ass'n of Regulatory Utilities Commissioners of Coleman*, 542 F.2d 11, 13-15 (3d Cir. 1976) (narrowly construing savings clause in Federal Railroad Safety Act). See also *Head v. New Mexico Board of Examiners*, 374 U.S. 424, 444, 83 S.Ct. 1759, 1770, 10 L.Ed.2d 983 (1963) (Brennan, J., concurring) (a general savings clause "does not resolve specific problems. . . but its inclusion in the statute plainly is inconsistent with congressional displacement of the state statute unless a finding of that meaning is unavoidable"), cited in *Lockheed Air Terminal, Inc. v. City of Burbank*, 457 F.2d 667, 675 (9th Cir. 1972) (finding of preemption "unavoidable" under Federal Aviation Act), *aff'd*, 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973). See generally, Note, *supra*, 12 Stanf.L.Rev. at 211-15 (courts have paid "slight attention" to savings clauses); Sands, *supra*, § 47.24 at 128 (where "the policy and purpose of the statute indicate that the common law was intended to be superseded, and the wording of the statute is so complete that it reasonably appears to be exclusive" statute may preempt the common law).

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that, as a secondary effect, tort actions may have some regulatory effect; this occurs because the primary and unquestionable effect of a finding of tort liability is to shift the "burden of losses" to "those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur." *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 379, 161 A.2d 69 (1960). Indeed, compensation is the very purpose of tort liability in this state and elsewhere. See, e.g., *O'Brien v. Muskin Corp.*, 94 N.J. 169, 179, 463 A.2d 298 (1983); *Michalko v. Cooke Color & Chemical Corp.*, 91 N.J. 386, 398, 401 A.2d 179 (1982); *Beshada v. Johns-Manville Product Corp.*, 90 N.J. 191, 205-06, 209, 447 A.2d 539 (1982); *Suter v. San Angelo Foundry & Machine Co.*, 81 N.J. 150, 173, 406 A.2d 140 (1979) ("Strict liability . . . is but an attempt to minimize the costs of accidents and to consider who should bear those costs."); *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 65, 207 A.2d 305 (1965) (purpose of tort liability "is to insure that the cost of injuries or damage . . . resulting from defective products . . . is borne by the makers of the products who put them in the channels of trade, rather than by the injured or damaged persons who ordinarily are powerless to protect themselves.") See also *Cinnaminson Township Board of Education v. U.S. Gypsum Co.*, 552 F.Supp. 855, 857 (D.N.J. 1982), quoting *Ramirez v. Amsted Industries, Inc.*, 86 N.J. 332, 350, 431 A.2d 811 (1981) (" . . . this court has long recognized the significance of the social policy of risk-spreading in establishing the manufacturer's duty to the product user under the rapidly expanding principles of strict liability in tort.") See generally *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 27 Cal.Rptr. 697, 701, 377 P.2d 897 (1962) (citing authorities); Prosser and Keeton, *The Law of Torts* § 1 at 5, § 4 at 20 (1984); Harper and James, *The Law of Torts* § 13.2 at 762-63 (1965). As defendants correctly contend, the imposition of tort liability may as a consequence, have a regulatory impact. Indeed, one purpose



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of products liability law is "to motivate individuals in the context of commercial enterprise to invest in safety." *Michalko, supra*, 91 N.J. at 398, 401 n. 4, 451 A.2d 179; *Beshada, supra*, 90 N.J. at 206-07, 447 A.2d 539. See also Prosser and Keeton, *supra*, § 4 at 25-26. Whether that regulatory impact conflicts with the purposes of the Act is a matter of implied preemption, and will be discussed later. Whether such impact comprises regulation, that is, creates a "requirement or prohibition," raises the question of express preemption.

The court finds that it does not. Regulation implies that certain behavior be absolutely required or prohibited: thus, one may not run a red light, or under the Act, fail to produce a cigarette package without the warning required by § 1333, without risking criminal liability or injunctive sanctions. Such behavior is prohibited and, in that sense, regulated. Similarly, were the New Jersey Legislature to mandate that a different warning be placed on cigarette packages, it would be imposing a requirement and, in that sense, regulating; such statute would, of course, be expressly preempted by the Act. Tort liability, however, merely "motivates" a person or business entity to act or refrain from acting by creating certain financial incentives; failing to do so, however, may or may not subject one to recurrent tort liability, and cannot subject one to an injunction or to criminal penalties in the common law context.<sup>6</sup> Hence, the producer of a defective produce, who has

6. The federal courts have long held that there is no federal common law of crimes, see, e.g., *United States v. Best*, 573 F.2d 1095, 1101 (9th Cir. 1978), citing *Morissette v. United States*, 342 U.S. 246, 263, 72 S.Ct. 240, 249, 96 L.Ed. 288 (1952); *United States v. Coolidge*, 14 U.S. (1 Wheat.), 415, 4 L.Ed. 124 (1816); *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 3 L.Ed. 259 (1812). See also *United States v. Berrigan*, 482 F.2d 171, 185 (3d Cir. 1973); *Levy v. Parker*, 478 F.2d 772, 796 and n. 35 (3d Cir. 1973), *rev'd on other grounds*, (Cont'd)

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been found liable in tort is put to a choice: it may avoid the risk of future liability by remedying the defect in its product or, at the extreme, by withdrawing such product from the market, or it may confront such risk, hoping that future juries, acting in light of different sets of facts, will find for it. Which course it takes depends upon a complex combination of economics, morality and psychology. In this sense, tort liability does not regulate at all; it merely creates some probability of changing the behavior of those upon whom it imposes liability, and without dictating the form of such change. See generally *Ferebee v. Chevron Chemical Co.*, *supra*, 636 F.2d at 1541. What that probability is, and the form such behavioral change would take, provides a starting point for an analysis of whether a conflict exists between the imposition of state tort liability and federal legislation, here, the Act. However, the differences between regulation and motivation are such as to preclude a finding of express preemption. As the one scholar who has explored this particular question has written

Courts adjudicate prior misconduct and require payment for injury. When a court imposes liability for failure to adequately warn, no specific "statement relating to smoking and health" is being required. The practical effect of this may be that cigarette companies will choose to add an addiction warning so as to avoid future liability. A damages award, however, requires only payment

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417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974), and New Jersey agrees. N.J.S.A. 2C:1-5(a) ("Common law crimes are abolished and no conduct constitutes an offense unless the offense is defined by this code or another statute of this state.")

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—it is not an injunction requiring the defendant to incorporate into its advertising a fixed legend different from the federally required label. The labeling acts do not prohibit a manufacturer from warning of undisclosed health risks. The only prohibition is against a state agency passing a law requiring cigarette companies to use a different label.

D. Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S.Cal.L.Rev. 1423, 1454 (1980) (footnote omitted).

The question of express preemption and the legal issues raised thereby ought not, under the principles enunciated *supra*, at 8-16, be resolved so as to displace traditional state common law remedies unless Congress' expression of its desire to do so is crystal clear. Congress' words reveal far less clarity: it did not expressly preempt the common law claims asserted here.<sup>7</sup>

#### B. Implied Preemption

As discussed earlier, the fact that plaintiff's common law claims are not expressly preempted does not end this inquiry.

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7. It should be noted that this section addresses only plaintiff's claims regarding failure to warn, Counts 3, 4 and 8, and deceptive advertising, Counts 5, 6 and 9. It does not address plaintiff's risk-utility allegation, contained in Count 2 and, to an extent, Count 7, of the complaint, because defendants do not contend that such claim is expressly preempted, but only that it is impliedly preempted as a result of conflict with the Act, Brief of Defendant Loew's Theatres, Inc. at 31-32, or because the Act has occupied the field. *Id.* at 32-33. Nor could defendants argue that this sort of claim has been expressly preempted, for language of the Act addresses only cigarette package labelling, on the one hand, 15 U.S.C. § 1334(a), and advertising or promotion, on the other, 15 U.S.C. § 1334(b).

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Rather, such claims may be *impliedly* preempted if Congress so intended, and manifested such intent either by "occupying the field," or if plaintiff's claims implicate state law which "actually conflicts" with the Act. The question of implied preemption necessarily requires a careful examination of the legislative history of the Act.

Defendants rest their implied preemption arguments on three aspects of the legislative history of the Act. First, they state that Congress made it absolutely clear that the Act was not meant as a prohibition of cigarette manufacture, sale or use. Citing the legislative history, defendants point to congressional concern with the moral and economic effects of such a prohibition, as well as to evidence that cigarette smoking actually enhances psychological and social well-being. Second, defendants point to Congress' desire to enact a uniform national policy with respect to the relationship between smoking and health, in part in order to protect the aforesaid values. And third, at oral argument, defendants contended that Congress intended that only the statement prescribed in § 1333 appear on cigarette packages; thus, they argue, no court may impose a greater duty to warn and, indeed, no cigarette company may voluntarily utilize a different warning.

Plaintiff counters that the legislative history assumes the continued existence of common law tort actions against cigarette companies, particularly in the area of products liability. Specific passages indicate debate over the effect of the warning mandated upon the defense of assumption of the risk but, plaintiff argues, thus indicate an acceptance of the existence of the common law suits in which such defense would be pled. Moreover, plaintiff contends, Congress could not have intended, and did not intend, to deprive prospective plaintiffs of the remedy at law here sought.



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The parties support their contentions with persuasive statutory authority and legislative history. Hence, defendants rely upon the debate surrounding passage of the Act, noting that, despite the call-to-action that ensued upon issuance of the Surgeon General's January 11, 1964 report entitled "Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Services," Congress chose a moderate course. Fearing the intrusion on "our personal rights and liberties" of a prohibition of cigarettes, *Cigarette Labeling and Advertising: Hearings on H.R. 2248, 3014, 4007, and 4249 Before the House Committee on Interstate and Foreign Commerce*, 89th Cong., 1st Sess. 225 (1965) (statement of Emerson Foote, Chairman, National Interagency Council on Smoking and Health), Congress rejected the notion of, for example, an outright ban on manufacture and sale. See also *Hearings on H.R. 2248, supra*, at 24 (statement of Congressman Morris K. Udall ("The Constitution guarantees us all these great freedoms including the freedom to abuse our health and make fools of ourselves if we want to, and I do not intend to deprive people of these great freedoms.")); *Hearings on H.R. 643, 1237, 3055, 6543 Before the House Committee on Interstate and Foreign Commerce*, 91st Cong., 1st Sess., 348 (1969) (statement of Dr. Sol R. Baker, Chairman, Committee on Tobacco and Cancer, American Cancer Society) ("... we are against prohibition. Some of us lived through one era of prohibition, and we certainly would not like to see another. We feel that it is the individual's right to smoke if he decides to . . ."); H.Rep. No. 449, 89th Cong., 1st Sess. (1965), reprinted in 1965 U.S. Code Cong. & Adm. News 2350, 2352 ("... the Committee believes that the individual must be safeguarded in his freedom of choice—that he has the right to choose to smoke or not to smoke . . ."). Indeed, it is even true that, in opting for a response to the Surgeon General's conclusion that "Cigarette smoking is a health hazard of sufficient importance in the United States to warrant

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appropriate remedial action," Congress heard testimony of the "significant beneficial effects of smoking primarily in the area of mental health." *Hearings on H.R. 2248, supra*, at 167, (statement of Rep. Horace R. Kornegay) quoting the Surgeon General's 1964 Report at 356. See also *id.* at 438-39 (statement of Fred S. Royster, Managing Director, Bright Belt Warehouse Association) ("There seems to be no doubt but that the use of tobacco in its various forms is relaxing, is enjoyable, and is conducive of a measure of contentment. . . It is possible that the relaxation and contentment and enjoyment produced by smoking has lengthened many lives."); *Hearings on H.R. 643, supra*, at 551 (statement of Joseph F. Cullman, III, Chairman of the Executive Committee, The Tobacco Institute); *id.* at 1008-09 (statement of Dr. Charles Hine, Clinical Professor of Pharmacology and Preventive Medicine, Univ. of California).<sup>8</sup> Most importantly, perhaps, Congress' choice of labeling as the appropriate response to the Surgeon General's conclusion that "[c]igarette smoking is associated with a 70-percent increase in the age-specific death rates of males" due to lung cancer, chronic bronchitis and emphysema, and cardiovascular diseases, see S.Rep.

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8. These considerations did not, however, appear in the Senate or House reports, or the Conference report in either 1965 or 1969. See S.Rep. No. 195, 89th Cong., 1st Sess. (1965); H.Rep. No. 449, 89th Cong., 1st Sess. (1965); H.Rep. No. 586, 89th Cong., 1st Sess. (1965) (Conference Report), U.S. Code Cong. & Admin. News 1965, p. 2350; S.Rep. No. 91-566, 91st Cong., 1st Sess. (1969); H.Rep. No. 91-289 91st Cong., 1st Sess. (1969); H.Rep. No. 91-897 91st Cong., 2nd Sess. (1970) (Conference Report), U.S. Code Cong. & Admin. News 1970, p. 2652. It is therefore not clear that these "beneficial effects" were actually considered by Congress. See generally Sands, *supra*, § 48.10 at 209 ("Although statements in the committee report as to the reason for or the nature and effect of the proposed law are freely used by the courts to determine the intent of the legislature, they have been more hesitant in resorting to similar statements made by committee members or other persons at the committee's hearings.")



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No. 195, 89th Cong., 1st Sess. 2-3 (1965), quoting the Surgeon General's 1964 Report, was the result of economic considerations. Indeed, the Act, in its preamble, seeks explicitly to protect "commerce and the national economy . . . to the maximum extent consistent with this declared policy . . ." 15 U.S.C. § 1331(2)(A). Thus, in 1965, Congress heard repeatedly of the economic ramifications of its proposed actions on the tobacco industry, "clearly a vital sector in this country's economy." *Hearings on S. 559 and S. 547 Before the Senate Committee on Commerce*, 89th Cong., 1st Sess. 246 (1965) (statement of Bowman Gray, Chairman of the Board, R.J. Reynolds Tobacco Co.). *See also id.* at 396-97 (statement of Sen. Sam J. Ervin, Jr.); *id.* at 543-45 (statement of Fred S. Royster, Managing Director, Bright Belt Warehouse Association); *id.* at 638-39 (statement of Ziggy Lane, Field Coordinator, National Association of Tobacco Distributors); 111 Cong. Rec. 13897-98 (June 16, 1965) (statement of Sen. Bass); 111 Cong. Rec. 13914-15 (June 16, 1965) (statement of Sen. Ervin). For example, Congress heard that, at that time, cigarettes were smoked by over 70 million people, spending over \$8 billion, of which \$3.3 billion went to excise taxes, supporting 750,000 farm families, as well as 96,000 persons in manufacturing. In all, tobacco was American's fifth largest cash crop, and accounted for \$405 million in exports. These statistics had become more impressive by 1969, when Congress again took up the issue, ultimately resolving to strengthen the Surgeon General's warning. *Hearings on H.R. 643, supra*, at 25-26 (statement of Rep. John L. McMillan), 42-43 (statement of Reps. Richardson Preyer and Wilmer D. Mizell), 61-63 (statement of Rep. W.M. Abbitt), 64 (statement of Rep. William H. Natcher), 604-05 (statement of Robert W. Scott, Governor of North Carolina); 115 Cong. Rec. 16189-91 (June 17, 1969) (statement of Rep. Edwards), 115 Cong. Rec. 16193-94 (June 17, 1969) (statement of Rep. Fountain); 115 Cong. Rec. 16294 (June 17, 1969) (statement of Rep. Abbitt).

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In light of these facts, Congress chose to attack the health problems associated with cigarette smoking not by virtue of a tobacco prohibition, but through a labeling requirement, made stronger in 1969 so as to be more effective. *See S.Rep. No. 91-566, supra*, at 2664; *H.Rep. No. 91-289, supra*, at 5.

Defendants are thus correct that Congress did not intend, by passing the Act, to eradicate the tobacco industry and did not expect to abolish cigarette smoking. They are also correct that Congress viewed this goal as being furthered by the preemption provision of the statute, which would serve to eliminate "diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health," 15 U.S.C. § 1331(2)(B), and to establish "a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health." 15 U.S.C. § 1331. (Congressional declaration of policy and purpose). Indeed, the preemption provision of the Act, and the policy which underlies it, grew out of a concern that various states and localities would enact conflicting laws and ordinances.

Some of the bills now pending before State legislatures would require a warning notice in cigarette advertisements appearing in periodicals published within the State. Others would require a health warning in cigarette commercials broadcast on a TV or radio station located within the State. The proposed form of the required caution notice varies from State to State.

As a practical business matter, it would be almost impossible for any manufacturer to comply with

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all of these differing and conflicting State and local laws

...

If Congress does not extend [§ 1334], there will be piecemeal and conflicting Federal and State regulations in this field. There will be litigation. And there will be enormous confusion and uncertainty. These are precisely the considerations which prompted Congress in 1965 to preempt this matter.

*Hearings on H.R. 643, supra*, at 554 (statement of Joseph F. Cullman, III). Indeed, congressional action in 1965 was directed at avoiding the "maze of conflicting regulations" which would have resulted had Congress not acted in this area, 111 Cong.Rec. 13901 (June 16, 1965) (statement of Sen. Moss). See S.Rep. No. 195, *supra*, at 4; H.Rep. No. 449, *supra*, at 2352. And, in 1969, Congress looked back at what it had done and, apparently saw itself as having "fended off efforts by regulatory agencies, individual state governments, and local governments in some cases to invade its jurisdiction." *Hearings on H.R. 643, supra*, at 16 (statement of Rep. Carl D. Perkins). See also 115 Cong.Rec. 16299 (June 18, 1969) (statement of Rep. Preyer). Rejecting the argument that states, or their subdivisions, ought to be able to "alert their own citizens to the dangers of smoking," *Hearings on H.R. 643, supra*, at 288 (statement of John F. Banzhaf, III, Executive Trustee, Legislative Action on Smoking and Health), see also H.Rep. No. 91-289, *supra*, at 33 (minority views of Reps. Jarman, Dingell and Adams), Congress clarified and continued the preemption provisions then in effect. See S.Rep. No. 91-556, *supra*, reported in 1969 U.S.Code Cong. & Adm.News 2652, 2663; H.Rep. No. 91-289, *supra*, at 4, 7, 9. Both in 1965, and again

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in 1969, Congress spoke of its actions in the language of preemption. Thus, for example, Senator Morton stated that "[t]he problem of smoking and health is national in scope. It is clearly one in which Congress should occupy the the field." 111 Cong.Rec. 13930 (June 16, 1965). Senator Magnuson, Chairman of the Senate Commerce Committee, apparently agreed

I think that all of us, or at least speaking for myself, are in general agreement . . . that if this matter is to be attended to, that it should be on a Federal level rather than a local or State level.

This is for very practical reasons, along with other reasons. If there is one product that is completely in interstate commerce it is tobacco.

It is grown in very few states and shipped all over to every State in the Union, every country in the world and, therefore, it would make it highly impractical and I think a burden on interstate commerce in this field should you have all kinds of regulations in various states.

*Hearings on S. 559, supra*, at 254. See also *id.* at 548. And, in 1969, Congressman Fountain argued:

. . . all of us are mindful of the fact that there are certain areas in which the national interest is so paramount—where individual state laws might so jeopardize the national interest—that preemption is necessary; and in my opinion the problem here and the facts are so obvious—with every state and probably many municipalities



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passing different regulations requiring the manufacturers of cigarettes to have different labels on packages going into different states and areas—that the situation would become intolerable and so confusing and so frustrating to all concerned that the entire tobacco industry might be destroyed. For these reasons I believe in the doctrine of preemption in this case.

*Hearings on H.R. 643, supra, at 30.*

From these, and other, statements, defendants glean a congressional intent to preempt a field which includes the common law claims here asserted. They bolstered this assertion at oral argument by asserting that Congress intended that only the warning set forth in § 1333 be permitted to appear on cigarette packages; hence, a cigarette manufacturer found liable would not be permitted to escape such liability by altering its behavior, a result which, they claim, could not have been intended by Congress. In support of this position, defendants cite to congressional concern that the labeling requirement include a concise statement:

Such cautionary statement should be short and direct, and should not be weakened in its impact by any qualifying adjectives such as “excessive,” “continual,” or “habitual.” To this end, the committee had concluded that the following factual and succinct statement should now be prescribed: “Caution: Cigarette smoking may be hazardous to your health.”

S.Rep. No. 195, *supra*, at 4. Consistent with such concern, the 1969 amendments to the Act changed the warning to: “Caution:

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The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health.” 15 U.S.C. § 1333. In so doing, and thereby lengthening the warning, Congress opted for a shorter warning than that proposed by the House, which had required a label stating “Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health and May Cause Lung Cancer or Other Diseases,” but longer and more equivocal than that proposed by the Senate, *i.e.*, “Warning: Cigarette Smoking Is Dangerous to Your Health.” See H.Rep. No. 91-897, *supra*, at 5 (Conference Report). Defendants do not, however, point to any passages stating explicitly that cigarette manufacturers would violate the Act by including a statement in addition to that prescribed in § 1333. Nor is the language of the Act to that effect.

Plaintiff recognizes the arguments proffered by defendant, responding simply, that Congress not only did not explicitly preempt state common law claims, but assumed their continued existence. In support of this argument, plaintiff also quotes extensively from the legislative history. It is true, as plaintiff argues, that discussions of preemption are silent as to the common law; it is also true that they focus upon executive or legislative regulation. First, congressional concern regarding preemption have, as plaintiff indicates, consistently been voiced without mention of the common law, and not even in terms of regulation in general, but of “laws” or “regulations” implying particular executive or legislative enactments. See, *e.g.*, *Hearings on S. 559, supra*, at 246, 548 (statement of Bowman Gray, Chairman of the Board of R.J. Reynolds Tobacco Co.) (“It would be intolerable if the states . . . were to remain free to pass conflicting laws or to impose conflicting regulations on this subject.”); *Hearings on H.R. 643, supra*, at 30 (discussing “laws” and “regulations”); *id.* at 554 (same, discussing “bills pending before State



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legislatures"); S.Rep. No. 195, *supra*, at 4 (discussion "a multiplicity of State and local regulations"); H.R.Rep. No. 449, *supra*, cited in 1965 U.S.Code Cong. & Adm.News, *supra*, at 2352 (same). Moreover, in arguing for the extension of the preemption provision in 1969, Representative Preyer of North Carolina addressed the amendment which that year altered such provision so that it no longer applied as previously to federal agencies. See 15 U.S.C. §§ 1335-36.

... that amendment speaks only to a ban on cigarette advertising by the FCC. It does not cover any other Federal agency and, more importantly, it does not cover such a ban if adopted by *each states legislature or local governing body*.

115 Cong.Rec. 16299 (June 18, 1969) (emphasis added). See also *Hearings on H.R. 643, supra*, at 610 (statement of Rep. Satterfield) (discussing federal, state and local "administrative and executive agencies"). And, perhaps most significantly, Representative Udall, in criticizing the bill ultimately passed in 1965 as one that "should be entitled, 'A bill for the relief and protection of the tobacco industry,' " listed as separate problems with the bill—which he labeled Hookers No. 1 and No. 2—its preemptive effect on "state and local government," and the extent to which it "protects [the cigarette manufacturers] against lawsuits by cigarette users," by undermining the assumption of the risk defense. 111 Cong.Rec. 16546 (July 13, 1965). Were these problems linked, he would certainly have discussed them together; that he did not demonstrates the inapplicability of the preemption clause to common law actions. It thus appears that Congress, initially acting in fear of certain state legislative action, see *supra*, at 30, continued to contemplate regulation by legislative or administrative processes as the subject of the preemption provisions of § 1334. See generally

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Garner, *supra*, 53 S.Cal.L.Rev. at 1453-54.<sup>9</sup>

That common law claims were not intended for preemption is still clearer when viewed in terms of certain specifics of the congressional debate and, as defendants urge, within the historical context of that debate. See Brief of Defendant Loew's Theatres, Inc. at 12 (citing cases). Prior to passage and then amendment of the Act, products liability cases based upon state common law had, in fact, been brought against cigarette companies. See, e.g., *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962),

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9. Defendants' arguments to the contrary are sparse. Defendant Liggett Group quotes Senate Report No. 91-566 as stating that the Act "prohibits health-related regulation or prohibition of cigarette advertising by any State or local authority." In reality, the 1969 Act clarified the previous preemption provision by making "it clear that the term 'State' includes any political division of any State." *Id.*, cited in 1970 U.S. Code Cong. & Admin. News 2652, 2663. And rather than stating the proposition cited in Liggett's brief, that Report actually states: "This preemption is intended to include not only action by State statute but by all other administrative actions or local ordinances or regulations by any political subdivision of the State." *Ibid.* Thus limited to legislative and executive action, this statement provides potent support for plaintiff's position.

Defendants are thus left to rely upon the singular statement of Rep. Bolling: "This preempts the right of any entity, of any government, to decide for itself . . ." 111 Cong. Rec. 16545 (July 13, 1965). In addition to the fact that this statement was immediately followed by remarks of Rep. Springer indicating the continued existence of common law suits, see *infra* at 38, remarks for which Rep. Bolling thanked Rep. Springer, the court notes that defendants should heed their own admonition: the remarks of a single legislator should "rarely . . . be taken as final." Brief of Defendant Loew's Theatres, Inc. at 21 n. 12, citing *Schiaffo v. Helstoski*, 492 F.2d 413, 428 (3d Cir. 1974). This is especially so where these remarks are uncharacteristic of congressional debate in general. *Ibid.* Here, Rep. Bolling may well have been making clear that which was clarified in 1969—that the preemption provision applied to "any government," including that of a locality.

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question certified on rehearing, 154 So.2d 169 (Fla.), *rev'd and remanded*, 325 F.2d 673 (5th Cir. 1963), *rev'd and remanded on rehearing*, 391 F.2d 97 (5th Cir. 1968), *rev'd per curiam*, 409 F.2d 1166 (5th Cir. 1969) (*en banc*), *cert. denied*, 397 U.S. 911, 90 S.Ct. 912, 25 L.Ed.2d 93 (1970) (implied warranty of fitness for use under Florida law); *Ross v. Philip Morris & Co.*, 328 F.2d 3 (8th Cir. 1964) (implied warranty of fitness for use under Missouri law); *Lartigue v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19 (5th Cir.), *cert. denied*, 375 U.S. 865, 84 S.Ct. 137, 11 L.Ed.2d 92 (1963) (implied warranty of fitness under Louisiana law), *cited in Hudson v. R.J. Reynolds Tobacco Co.*, 427 F.2d 541 (5th Cir. 1970); *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961), *aff'd on rehearing*, 350 F.2d 479 (3d Cir. 1965), *cert. denied*, 382 U.S. 987, 86 S.Ct. 549, 15 L.Ed.2d 475 (1966), *modified*, 370 F.2d 95 (3d Cir. 1966), *cert. denied*, 386 U.S. 1009, 87 S.Ct. 1350, 18 L.Ed.2d 436 (1967) (warranty of fitness for use and negligent failure to warn, under Pennsylvania law); *Cooper v. R.J. Reynolds Tobacco Co.*, 234 F.2d 170 (1st Cir. 1956), *on remand*, 158 F.Supp. 22 (D.Mass. 1957), *aff'd*, 256 F.2d 464 (1st Cir. 1958) (fraud under Massachusetts law); *Albright v. R.J. Reynolds Tobacco Co.*, 350 F.Supp. 341 (W.D.Pa. 1972), *aff'd mem.*, 485 F.2d 678 (3d Cir. 1973), *cert. denied*, 416 U.S. 951, 94 S.Ct. 1961, 40 L.Ed.2d 301 (1974) (products liability action under Pennsylvania law).<sup>10</sup> And, although neither the statute itself

10. *Albright* was filed on July 5, 1962. See Garner, *supra*, 53 S. Cal. L. Rev. at 1423 n. 3.

It should be noted that these cases address the problems of labeling and advertising under the aegis of breach of warranty, negligence or fraud causes of action. See, e.g., *Pritchard v. Liggett & Myers*, *supra*, 295 F.2d at 299-300. Indeed so intertwined is labeling or advertising with any tort causes of action based upon design defects, that the position of defendants Philip Morris and

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nor the final committee reports explicitly address the status of these cases after passage of the Act, congressional debate recognized their continued existence. Often, such recognition took the form of discussion as to the effect of the required warning on the defense of assumption of the risk. Thus, in 1965, Congressman Fascell of Florida expressed his view that

The legislative record makes it clear that passage of this law and compliance by the manufacturer in no way affects the right to raise the defense of "assumption or [sic] risk" and the legal requirement for such a defense to prevail; nor does it shift the burden of proof, nor could it be considered a legal or factual bar to the plaintiff user.

111 Cong.Rec. 16543-16544 (July 13, 1965). Later, Congressman Fascell clarified his position. In response to Congressman Bolling's opposition to the preemption provisions of the Act, Mr. Fascell stated:

There might be one consoling factor in the adoption of the conference report. By virtue of the language being required as a result of the law, it would raise the presumption that every company that makes and distributes this process does so with

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Liggett Group, that the Act permitted all tort actions except those based upon labeling and advertising is absurd. See Brief of Defendant Philip Morris at 27-28; Brief of defendant Liggett Group at 31-32. Labels and advertisements constitute a manufacturer's public statements about its product; they are a necessary component of any common law tort analysis.

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knowledge. If that is true, it would redound to the benefit of a plaintiff bringing an injury suit.

111 Cong.Rec. 16545 (July 13, 1965). Congressman Fascell thus believed that the warning would ultimately help plaintiffs in cases such as these. See also 111 Cong.Rec. 16546 (July 13, 1965) (statement of Rep. Udall). Theodore Ellenbogen, Acting Assistant General Counsel of the Department of Health, Education, and Welfare, testifying before the House Committee on Interstate and Foreign Commerce, disagreed.

MR. MACKAY: I would like to ask you this as a lawyer. Would not the presence of the type of warning suggested in these bills greatly strengthen the hand of a defendant in a tort case?

MR. ELLENBOGEN: In the long run it might do so, because those cases that I have read—and I have not made a real study of this particular thing—but the *Green* case, for example, is based, I believe, on the implied warranty of fitness, and there being no notice of the health hazard to the consumer.

*Hearings on H.R. 2248, supra*, at 176. In response to Representative Mackay's further inquiries on this topic, a memorandum was supplied to the Committee, reviewing the caselaw, and concluding, as follows:

Assuming a clear statement, suits based on negligence probably would be barred on three grounds. Having warned the buyer, the manufacturer could not be said to be negligent;

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the buyer is contributorily negligent in using a product he knows might harm him; and having been warned the buyer assumes the risk attendant to the use of the cigarettes . . . actions based on breach of warranty would probably be unsuccessful. When a seller warns a buyer of the possibility of a certain form of injury, it cannot be said that he is warranting that the injury will not occur.

*Id.* at 178.

Again in 1969, the House Committee on Interstate and Foreign Commerce considered this point at great length. Committee members attempted to show that the tobacco industry's support of the warning then in effect was as a result of the benefits it gained from the undermining of the assumption of the risk defense. *Hearings on H.R. 643, supra*, at 577-78 (colloquy between Rep. Moss and Joseph F. Cullman, III), 579-81 (colloquy between Rep. Dingell and Mr. Cullman), 589 (Colloquy between Rep. Thompson and Mr. Cullman), 589 (colloquy between Rep. Satterfield and Mr. Cullman). Representative Watson disagreed. *Id.* at 579, 582. However, both in 1969, and previously in 1965, all parties assumed the existence of lawsuits such as the instant one. Indeed, the congressional debate as to the validity of certain defenses presupposes such suits. Thus, Congressman Watson was correct when he stated that "nowhere in the Act of 1965 does it preclude an individual or prevent an individual from pursuing a common-law liability, as far as I know . . . ." *Id.* at 579. In fact, in 1965, the Department of Health, Education, and Welfare considered such suits to be "a private matter . . . not regulated by this bill . . . ." *Hearings on H.R. 2248, supra*, at 176 (statement of Theodore Ellenbogen).



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The legislative history thus supports plaintiff's position in these respects.<sup>11</sup> Such position is further strengthened by the structure of the statute ultimately passed: although injunctive relief is available if sought by the government, 15 U.S.C. § 1339, and minimal criminal sanctions applicable to violations of the Act, 15 U.S.C. § 1338, the statute is silent as to damage claims. Absent the existence of common law claims such as those asserted by plaintiff, victims of cigarette smoking would thus be left with no remedy at all, a result which is "inconceivable," *Silkwood v. Kerr-McGee Corp.*, *supra*, 104 S.Ct. at 629 (Blackmun, J., dissenting), especially in light of the existence of such claims prior to passage of the Act. Nonetheless, such claims might be preempted notwithstanding this legislative history if it were found either that Congress "occupied the field" or that the existence of such claims creates an actual conflict with the Act. It is these concerns that the court next addresses.

*1. Did Congress preempt state common law claims by occupying the field?*

As the court has noted earlier, preemption implied from legislative intent may be inferred where Congress "occupied the

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11. It also supports plaintiff's position with respect to the "addiction theory" of Count 9 and the advertising claims of Counts 4 and 5 of plaintiff's complaint. It is true that Congress chose not to address the addiction problem, despite the presentation of "a great deal of scientific testimony" regarding the issue. *See* Brief of Defendant Lowe's Theatres, Inc. at 27, citing legislative history. Nor, however, did it distinguish claims based upon addiction from the others which it chose not to preempt. *See* Garner, *supra*, 53 S. Cal. L. Rev. at 1453-54. Similarly, congressional inaction regarding the recognized dangers associated with cigarette advertising and promotion, *see id.* at 29, citing legislative history, ought not be construed as forbidding damage claims for injuries caused by such advertising and promotion, if such causation can be proved.

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field" in a given area. Whether Congress did so may, in turn, be inferred in any of three ways: first, if there is a pervasive scheme of federal regulation in such area; second, if the federal interest in such area is dominant; and third, if the objective of federal law in such area and the obligations imposed by it reveal the same purpose. *See supra* at 1150. Defendants argue that Congress explicitly intended to preempt the field and that, in debate and elsewhere, it demonstrated such intent explicitly and by creating a pervasive scheme of federal regulation to deal with a problem uniquely federal in scope. The court disagrees.

It is true that at least one Senator stated that "[t]he problem of smoking and health is national in scope. It is clearly one in which congress should occupy the field." 111 Cong.Rec. 13930 (June 16, 1965) (statement of Sen. Morton). Other Senators, Representatives and delegates from the tobacco industry, the executive branch, and public interest groups agreed that federal regulation was necessary, in order to avoid a "maze of conflicting regulations" and deal with "a product that is completely in interstate commerce." *See supra* at 1159. Hence, Congress passed a bill purporting "to establish a comprehensive federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health." 15 U.S.C. § 1331.

The court agrees that Congress thus intended to occupy a field and that it indicated this intent as clearly as it knew how. It utilized the language of preemption; it stated that it was establishing a pervasive scheme of regulation; and it discussed the dominant federal interest in the fields affected by its intended regulation. *See, e.g.*, H.Rep. No. 449, *supra*, at 2351-52 ("The problem has broad implications in the field of public health and health research, and involves potentially far-reaching consequences for a number of sectors of our economy. The entire tobacco raising

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and manufacturing industry, and the numerous businesses which market tobacco products, are involved. Some proposals have been made in this area which might lead to severe curtailing or the possible elimination of cigarette advertising. This could have a serious economic impact on the television, radio, and publishing industries in the United States.”); 111 Cong.Rec. 14,423 (June 22, 1965) (statement of Rep. Harris) (“...this is an interstate problem.”) However, the legislative history of the Act, as well as its language, persuades the court that the field it occupied does not encompass the common law products liability claims here asserted. That field was expressly limited to “cigarette labeling and advertising with respect to any relationship between smoking and health,” 15 U.S.C. § 1331; the preemption provision of the Act proscribes state or local action that would *require* a particular statement on cigarette packages, 15 U.S.C. § 1334(a), or impose any “requirement or prohibition” with respect to cigarette advertising. 15 U.S.C. § 1334(b). Congress addressed itself to a problem national in scope, and in 1965, and again in 1969, chose to remedy that problem by requiring certain labeling, and regulating advertising, and finally making it “unlawful . . . on any medium of electronic communications subject to the jurisdiction of the Federal Communications Commission.” 15 U.S.C. § 1335. It did not, however, address itself to the problem of compensating the victims of cigarette smoking and/or imposing civil liability on cigarette companies. Indeed, the issues are within a different field, that of products liability, the continued existence of which was assumed by Congress, and left for the states. Especially because “federal occupation of a field will not be lightly inferred,” *Tribe, supra*, § 6-25, at 384 (citing cases), the fact that two different areas are thus implicated renders preemption improper. *See, e.g., Silkwood v. Kerr-McGee Corp., supra*, 104 S.Ct. at 622-26 (Price-Anderson Act does not preempt state tort law remedies); *Pacific Gas and Electric, supra*, 103 S.Ct. at 1726

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(Atomic Energy Act leaves to the states traditional powers to regulate utilities); *Sears-Roebuck & Co. v. San Diego County District Council of Carpenters, supra*, 436 U.S. at 194-97, 98 S.Ct. at 1756-57 (cases relating to labor relations are not preempted if “different from” those presented to the National Labor Relations Board); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 336, 93 S.Ct. 1590, 1597, 36 L.Ed.2d 280 (1973) (Water Quality Improvement Act does not preempt state common law claims for damages for oil spillage); *Huron Cement Co. v. City of Detroit*, 362 U.S. 440, 445, 80 S.Ct. 813, 817, 4 L.Ed.2d 852 (1960) (Detroit ordinance had different purposes from, and therefore is in a different field than congressional enactments concerning shipping). That the areas are similar begins rather than ends the inquiry; where Congress limits the scope of its enactment and manifests its intent not to interfere with areas beyond that scope, the preemptive effect of such enactment must be similarly proscribed. *See generally Pacific Gas & Electric, supra*, 103 S.Ct. at 1726 (“When the federal government completely occupies a given field or an identifiable portion of it . . . the test of preemption is whether ‘the matter on which the state asserts the right to act is in any way regulated by the federal government.’”), quoting *Rice v. Santa Fe Railroad Corp., supra*, 331 U.S. at 236, 67 S.Ct. at 1155. Admittedly, the areas addressed by plaintiff’s complaint, and those within the scope of the Act are related. Cigarette labeling and advertising are at issue in plaintiff’s complaint, and the form they take may be affected by this lawsuit, if successful. However, as it did with respect to the Price-Anderson Act and, more explicitly, the Water Quality Improvement Act, Congress, in enacting the Federal Cigarette Labeling Act, intended only that states be precluded from regulating cigarette labeling and advertising. Compensation is, as the court has noted elsewhere, an entirely different matter. *See supra* at 1155-1156. The legislative history demonstrates that Congress assumed that, in appropriate



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cases and where liability could be proven, such compensation would be paid, though such cases had failed in the past. It limited the scope of the Act, and especially of the preemption provision to that which it feared would interfere with the operation of the Act, and the health of the tobacco industry—state or local regulation, by statute, ordinance or other official legislative or executive enactment. It correspondingly limited the obligations imposed and the remedies available under the Act to those consonant with this purpose; a particular label was required, 15 U.S.C. § 1333, advertising was regulated, 15 U.S.C. § 1334-35, and reports were called for. 15 U.S.C. § 1337. Only the government can enforce the statute, by criminal prosecution or injunction. 15 U.S.C. § 1338-39.<sup>12</sup> Products liability standards

12. However, Congress did not create a particularly pervasive or comprehensive regulatory system when enacting the Cigarette Labeling Act. See *Tribe, supra*, § 6-25 at 385 (where a multiplicity of federal regulations govern a given field, the pervasiveness of the regulations will help to sustain a conclusion that Congress intend to exercise exclusive control over the subject matter), citing *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America v. Lockridge*, 403 U.S. 274, 296, 91 S. Ct. 1909, 1922, 29 L.Ed.2d 473 (1971); *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61, 75 S.Ct. 191, 99 L.Ed. 68 (1954). See also *Fidelity Federal Savings & Loan Association, supra*, 458 U.S. at 153, 102 S.Ct. at 3022. But see *New York Department of Social Services v. Dublino*, 413 U.S. 405, 415, 93 S.Ct. 2507, 2514, 37 L.Ed.2d 688 (1973) (rejecting the contention that “preemption is to be inferred merely from the comprehensive character” of the provisions at issue), cited in *Motor and Equipment Manufacturers Association, Inc. v. E.P.A.*, 627 F.2d 1095, 1107-08 and n. 20 (D.C. Cir. 1979), cert. denied, 446 U.S. 952, 100 S.Ct. 2917, 64 L.Ed.2d 808 (1980). Here, while defendants are correct that Congress has evinced continuing interest in the area of cigarette smoking, see Brief of Defendant Loew's Theatres, Inc. at 33-34, regulation of the area has been considerably less pervasive than in such areas as labor law, interstate trucking and banking, in which preemption was found to exist, or in welfare, the environment, or even nuclear power, in which such preemptive effect has been limited or denied. See *supra* (cases cited in this note); *Silkwood, supra*; *Pacific Gas & Electric, supra*.

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are thus left to the states, and mention of the corresponding private rights of action and damage remedies available to individuals is omitted from the Act. See generally *Rice v. Santa Fe Elevator Corp.*, *supra*, 331 U.S. at 230, 67 S.Ct. at 1152 (field preempted by federal statute determined, in part, by objective thereof) (citing cases); *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, *supra*, 418 U.S. at 271, 94 S.Ct. at 2774 (field preempted by federal statute determined, in part, by remedies available thereunder). These private rights of action and private remedies, traditionally governed by state law, ought not, therefore, be assumed to be eradicated by the Act. See *Rice, supra*, 331 U.S. at 230, 67 S.Ct. at 1152. Congress did not intend that they be, and this court will not render them so.

## 2. Does state tort law conflict with the Act?

As in *Silkwood*, the question of preemption here turns ultimately “on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law.” 104 S.Ct. at 626. See also *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, *supra*, 450 U.S. at 317-18, 101 S.Ct. at 1130. As noted above, a conflict occurs either where compliance with state and federal law is a “physical impossibility” or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” See *supra*, at 1151. However, in general, conflicts ought not lightly be inferred. As the Supreme Court has recently stated, in a different context:

The existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute. A state regulatory scheme is not



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preempted by the federal antitrust laws simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate the antitrust laws. A state statute is not preempted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect.

*Rice v. Norman Williams Co.*, 458 U.S. 654, 659, 102 S.Ct. 3294, 3299, 73 L.Ed.2d 1042 (1982) (citing cases). Implicitly utilizing this standard, the one federal court that has construed the preemption provision of the Act refused to find a conflict between the goal of uniformity, as embodied therein, and FCC regulation of television broadcasts regarding cigarettes. *Banzhaf v. F.C.C.*, 405 F.2d 1082, 1090-91 (D.C.Cir. 1968), *cert. denied*, 396 U.S. 842, 90 S.Ct. 51, 24 L.Ed.2d 93 (1969) (Bazelon, C.J.).<sup>13</sup> Nonetheless, the question of whether or not New Jersey common law of products liability conflicts with the Act is one of first impression.<sup>14</sup>

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13. The one scholar that has examined this provision has concluded that "[t]he labeling acts manifest neither a congressional intention to preempt courts from granting money judgments nor a conflict between such judicially imposed liability and federal law." Garner, *supra*, 53 S. Cal. L. Rev. at 1454.

14. Defendants are correct that, in addressing this question, the court focuses not upon the purposes of state law, be they regulatory or merely compensatory, but upon the effect of such law. See, e.g., *Perez v. Campbell*, 402 U.S. 637, 650-652, 91 S.Ct. 1704, 1711-12, 29 L.Ed.2d 233 (1971). Thus, the court here examines "first the purposes of the federal law and second the effect of the operation of the state law on these purposes." *Finberg v. Sullivan*, 634 F.2d 50, 63 (3d Cir. 1980) (emphasis supplied), citing *Perez*, *supra*. In this sense, the analysis here undertaken differs from that regarding express preemption, *supra*, at 1153-1156. There, the question was one of whether the New Jersey common law of products liability constituted regulation; the New Jersey courts' characterization of such law is much more relevant to that inquiry.

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This question requires that the court first examine the purposes of the Act. As we have seen, as they relate to its preemptive provision, those purposes are essentially two: first, Congress intended to ensure the continued vitality of the tobacco industry, for economic reasons and to preserve freedom of choice for the individual; second, Congress sought to implement this and other goals by making uniform the labeling and advertising requirements imposed upon cigarette manufacturers. Defendants also point to the obvious remedial purposes of the Act, which sought to address the health concerns raised by the Surgeon General's Report, and argue that these purposes are best furthered by a concise and unambiguous warning. It is claimed that all of these purposes will be undermined by the simultaneous existence of state common law claims such as those asserted by plaintiff.

The court first notes that in no event is compliance with both the Act and state law a "physical impossibility." At most, state law imposes liability in the form of damages upon defendants. Payment of such damages, as well as fulfillment of the labeling requirements of the Act, are clearly possible. Indeed, the imposition of criminal liability under the Act, as well as the payment of damages, are both possible. See, *Silkwood*, *supra*, 104 S.Ct. at 626. Defendants, however, argue that state common law may impose, for example, labeling requirements inconsistent with the Act, rendering compliance with both impossible. This argument is without merit. First, as observed earlier, common law liability does not impose requirements upon any party; rather, it allows parties to choose between risking further liability by not changing their behavior, or attempting to negate such risk by, for example, adding a more stringent label to a cigarette package. Which course of action one takes is a matter of choice; one cannot be enjoined or held criminally liable for the course taken. Hence, no requirement is imposed. As the Court of Appeals for the District

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of Columbia has recently stated, in holding that a label found adequate by the Environmental Protection Agency for purposes of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 *et seq.*, ("FIFRA") could nonetheless provide the basis for liability under Maryland common law, notwithstanding a preemption clause prohibiting states from imposing different labeling requirements.

. . . Maryland can be conceived of as having decided that, if it must abide by EPA's determination that a label is adequate, Maryland will nonetheless require manufacturers to bear the risk of any injuries that could have been prevented had Maryland been allowed to require a more detailed label or had Chevron persuaded EPA that a more comprehensive label was needed. The verdict [against Chevron] does not command Chevron to alter its label—the verdict merely tells Chevron that if it chooses to continue selling paraquat in Maryland, it may have to compensate for some of the resulting injuries. That may in some sense impose a burden on the sale of paraquat in Maryland, but it is not equivalent to a direct regulatory command that Chevron change its label. Chevron can comply with both federal and state law by continuing to use the EPA-approved label and by simultaneously paying damages to successful tort plaintiffs such as Mr. Ferebee.

*Ferebee v. Chevron Chemical Co.*, *supra*, 736 F.2d at 1541.<sup>15</sup>

15. Defendant Loew's Theatres, Inc. has attempted to distinguish *Ferebee* (Cont'd)

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Moreover, even if a verdict against cigarette manufacturers were viewed as imposing a requirement upon them, and the manufacturers thus chose to place an additional warning on, or in their packages, such action would not be incompatible with the Act. Section 1333 makes it unlawful not to place the prescribed warning on cigarette packages; it is silent as to additional information or warnings that might also be included.<sup>16</sup> Hence, it is not "physically impossible" for a cigarette manufacturer to chose to alter its behavior in response to an adverse jury verdict.

Nor does the existence of state common law claims stand as an obstacle to the execution of Congress' intent in passing, and then amending, the Act. Primarily, this is because, as in *Silkwood*, Congress intended that state common law claims survive, and thus, that whatever tension exists between federal regulation of cigarette labeling and advertising and state common law claims be tolerated. 104 S.Ct. at 625. That congressional

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from the instant matter, based primarily upon the regulatory scheme created by FIFRA. It is true that FIFRA, unlike the Federal Cigarette Labeling Act, delegates great responsibility to the states. From this fact, defendant gleans a legislative intent not to preempt state common law claims. While the existence of a state role may be evidence of an intent not to preempt, it is neither the only such evidence, nor necessary to a holding that preemption has not occurred. Just as the court did in *Ferebee*, and in *Silkwood*, this court has examined the legislative history of the Act at issue in great detail. Its conclusion—that preemption is not warranted—is based, as it should be, on that particular history. See *Note, supra*, 12 Stanf. L. Rev. at 208-210. Other cases, such as *Ferebee* and *Silkwood*, state general principles applicable here, but the court recognizes that the results reached in each of those cases are instructive only by analogy.

16. Because the Act carries criminal penalties, it should be strictly construed. See, e.g., *United States v. Bass*, 404 U.S. 336, 348, 92 S.Ct. 515, 522, 30 L.Ed.2d 488 (1971).



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intent is, as has been shown, clear: state common law claims existed prior to passage of the Act, were assumed to have a continued existence during the legislative process, and were not eliminated by the passage of the Act. Though it is true that, as defendants argue, even state regulation supplementary to a federal enactment—a characterization not inapposite here—may be preempted by such federal enactment, *see, e.g., Campbell v. Hussey*, 368 U.S. 297, 302, 82 S.Ct. 327, 329, 7 L.Ed.2d 299 (1961); *Cosmetic, Toiletry & Fragrance Association, Inc., v. State of Minnesota*, 440 F.Supp. 1216, 1224 (D.Minn. 1977), *aff'd*, 575 F.2d 1256 (8th Cir. 1978), that is only the case where there is an actual conflict between the two, and the federal enactment is “significantly impeded by the state law.” Tribe, *supra*, § 6-24 at 379 and n. 12. No such conflict exists here.

First, Congress’ intention that the cigarette industry be allowed to survive, and that the consumer remain free to choose or not to choose to smoke, is not undermined by the imposition of liability upon cigarette companies.<sup>17</sup> That concern was reflected in Congress’ decision not to ban cigarettes or cigarette advertising altogether, and to maintain uniform labeling. Congress recognized that liability under state tort law would continue to exist, and did nothing to immunize cigarette manufacturers from such liability. The argument that the imposition of such liability will jeopardize the entire cigarette industry, and with it the nation’s economic well-being and its citizens’ freedom of choice, is hypothetical and speculative at best. Indeed, even those claims based upon theories of strict products liability, may co-exist with an industry whose development and promotion are to be fostered by congressional action. *See Silkwood, supra*, 104 S.Ct. at 625-26.

17. The court notes that this is particularly true in light of the failure of prior cases of this sort. *See supra* at 1161-1162 (citing cases).

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*A fortiori*, they exist where, as here, the industry upon which liability is to fall is one which Congress has found responsible for death and disease. In any event, as with nuclear power, the legislative history of the Federal Cigarette Labeling Act reveals a Congress unwilling to deprive individuals of their common law damage remedies, whatever they may be.<sup>18</sup>

18. Defendants argue that plaintiff’s risk-utility claims in particular are preempted in that, since such claims would enable juries to drive the cigarette industry out of business, they conflict with the congressional purpose to ensure the survival of the cigarette industry. *See O’Brien v. Muskin Corp., supra*, 94 N.J. at 184, 463 A.2d 298. This argument misconceives the nature of this claim: risk-utility is one method of taking the first step in deciding whether a strict liability analysis should be applied, by proving the existence of a defect. *O’Brien, supra*, 94 N.J. at 185-86, 463 A.2d 298. *See also Feldman v. Lederle Laboratories, supra*, 97 N.J. at 444 and n. 4, 479 A.2d 374. That method renders a manufacturer strictly liable for injuries suffered as a result of its product, irrespective of whether such manufacturer knew or should have known of the product “defect.” *See Feldman, supra*, at 450-51, 479 A.2d 374. However, the method also requires the assessment of many factors—the so-called “Wade factors”—including the reasonableness of the defendant’s conduct in failing to improve the product (factor 4) and of the plaintiff’s conduct in using it (factors 5 and 6). In particular, risk-utility analysis requires that the jury assess

- (6) The user’s anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or the existence of suitable warnings or instructions.

*O’Brien, supra*, 94 N.J. at 182, 463 A.2d 298, quoting *Cepeda v. Cumberland Engineering Co.*, 76 N.J. 152, 174, 386 A.2d 816 (1978). Hence, reflected in risk-utility analysis is a set of principles traditionally associated with torts based upon negligence. *O’Brien, supra*, 94 N.J. at 181, 463 A.2d 298. More important, age-old notions of assumption of risk, such as those about which Congress was concerned in debate, *see supra*, at 1162-1163, are contemplated in factor 6, quoted above. The argument then, that this type of analysis was outside the

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Second, as shown above, Congress manifested a deep concern over the possibility that different states or localities would impose different labeling or advertising requirements, thereby both imperiling the tobacco, advertising and related industries, and undermining the "comprehensive federal program" which it sought to implement. Of course, such uniformity would not necessarily be imperiled by a jury verdict against cigarette manufacturers, for such verdict might not result in a corresponding change in behavior on the part of the manufacturers; the choice would be theirs to make. Thus, in other areas in which federal labeling is mandated, or directed by federal agencies, as advertising is under the Act, 15 U.S.C. § 1335-36, state common law liability has nonetheless been allowed to survive. See, e.g., *Ferebee, supra*, 736 F.2d at 1540-52; *Feldman, supra*, 97 N.J. at 461, 479 A.2d 374, citing, e.g., *Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652, 658 (1st Cir. 1981) (drug manufacturer liable under state tort law for failure to warn notwithstanding FDA approval of "uniform" label);<sup>19</sup> *Raymond v. Riegel Textile Corp.*, 484 F.2d

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scope of congressional contemplation, is without merit. Congress abridged no common law cause of action whatsoever in passing the Act. That each such cause of action, and this one in particular, may prove injurious to the cigarette industry is a truism, but one that apparently did not bother Congress.

19. FDA approved warnings thus do not preempt state common law products liability claims *despite* the preemptive effect that has generally been given the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 *et seq.* See generally *McDermott v. State of Wisconsin*, 228 U.S. 115, 131-32, 33 S.Ct. 431, 434-35, 57 L.Ed. 754 (1913); *National Women's Health Network v. A.H. Robins Co.*, 545 F. Supp. 1177, 1181 (D. Mass. 1982); *Pharmaceutical Society of the State of New York, Inc. v. Lefkowitz*, 454 F. Supp. 1175, 1179 (S.D.N.Y. 1978) (state labeling laws preempted to the extent they conflict with the Act) (dictum), *aff'd*, 586 F.2d 953 (2d Cir. 1978); *Cosmetic, Toiletry & Fragrance Association, Inc. v. State of Minnesota, supra*, 440 F. Supp. at 1220-25.

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1025, 1026-28 (1st Cir. 1973) (state products liability law applied notwithstanding standards promulgated in the Flammable Fabrics Act, 15 U.S.C. § 1191 *et seq.*, which, at that time, contained a broad preemption provision) (citing cases); *Hubbard-Hall Chemical Co. v. Silverman*, 340 F.2d 402, 405 (1st Cir. 1965) (Department of Agriculture approved label did not preempt state tort action for failure to warn, in part because Congress had not occupied the field in this area). Underlying these decisions, is the recognition that compensation for individuals as a result of an injury caused by particular products is not only a right that ought to be abridged only where Congress clearly intended to do so, see *Silkwood, supra*, 104 S.Ct. at 623; *id.* at 629 (Blackmun, J., dissenting); *Raymond v. Riegel Textile Corp.*, *supra*, 484 F.2d at 1028, but also one that does not necessarily interfere with governmental regulation of such products. See *Silkwood, supra*, 104 S.Ct. at 626. Here, too, the notion that unless state common law claims are preempted, cigarette manufacturers will be subjected to multiple and conflicting standards with regard to labeling and advertising, is purely hypothetical. Plaintiffs may not prevail in these lawsuits and, if they do, manufacturers may not respond to such suits by altering their labels or changing their advertising practices. See *Ferebee, supra*, 736 F.2d at 1541. Viewed this way, the payment of compensation to victims of tortious activity on the part of defendants, if it is proved, does not necessarily, or even probably, conflict with the purposes of uniformity that underlie the Act, let alone jeopardize the survival of the tobacco industry.

Indeed, the payment of such compensation may further the remedial purposes of the Act, by, for example, aiding in the exposure of dangers not previously associated with cigarette smoking, encouraging manufacturers or consumers to petition Congress, the FCC or the FTC for reasonable regulatory changes,

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or itself pressuring Congress to act. *See Ferebee, supra*, 736 F.2d at 1541-42. Moreover, defendant's argument that, were the Act to result in added warnings, it would dilute the effectiveness of the warnings that now exist, thereby undermining the primary purpose of the Act, is without merit. Congressional concern was focused on a fear that such warnings would become encumbered with qualifications, and the message that cigarette smoking is dangerous be accordingly weakened. *See S.Rep. No. 195, supra*, at 4. Congress feared not stronger, but weaker statements; only the former would be encouraged by state tort recoveries.<sup>20</sup> Hence, even industry reaction to a finding of liability would not, in this sense, engender conflict with the Act.

In sum, the payment of compensation to injured individuals in no way creates an actual conflict with the Federal Cigarette Labeling Act, or Congress' goals in enacting it. As Congress has not occupied a field which encompasses common law causes of action, or explicitly stated that it intended to preempt such claims, the court cannot but find that such claims exist now, as they existed prior to passage of the Act. The legislative history of the Act, and its amendment, further confirms that Congress did not intend that such claims be preempted. These claims survive and continue

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20. The court notes in this regard that the House of Representatives has recently passed a measure that would mandate stronger warnings on cigarette packages; these four warnings would be placed on such packages on a rotating basis. In addition to complicating the entire warning scheme, three of these four warnings are longer than the body of the present labeling requirement. *See* 130 Cong. Rec. H9222 (Sept. 10, 1984) (text of H3979, § 4(a)(1)). The court recognizes that this bill represents legislation which remains pending and is therefore of limited value in assessing even Congress' present inclination, let alone that of the Congress which passed the Act here under consideration. Still, the Bill demonstrates a diminished congressional concern with a simple or concise labeling scheme where such scheme does not accurately represent the dangers associated with smoking.

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to represent an individual's sole recourse in the event of injury based on cigarette smoking, should that injury be found to have resulted from manufacturers' tortious activity, whether that be in the manufacture, design, advertising or marketing of their undisputably harmful products. Congress did not, despite its solicitousness for the cigarette industry, deprive citizens of this recourse. Nor shall the court, in deference to Congress and with respect for the state common law and individuals' right to invoke it, do so.

## CONCLUSION

The arguments presented by the defendants in this case symbolize a common misperception of the function of government regulation and the imposition of standards of conduct which result. It would be inappropriate to conclude that what is not prohibited is permitted or that a minimum standard fixes the maximum as well. It is impossible for the government to codify every act which should not be done or the standards by which every act should be performed. Thus, government has frequently established standards in those areas in which a particular industry has failed to establish its own. But injuries to persons, property and the environment were wrong even before government declared that they were wrong.

Now that government has acted in many areas and decreed safety and quality standards, it would be unfortunate if those directed to do no less, assume that they need do no more. In almost every instance, government standards are meant to fix a level of performance below which one should not fall. However, legal minimums were never intended to supplant moral maximums. Nor were they intended to eliminate pride in quality and craftsmanship or self-imposed standards of health and safety.

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In this case the tobacco industry argues that because the warning mandated by Congress prohibits them from doing less, they need not and cannot do more. The court here concludes that the warning of the Surgeon General fixes the minimum. Indeed, indications are that the Surgeon General himself does not view the warning as adequate. For these reasons, persons who claim that the warnings are not adequate and that they have been injured as a result should not be deprived of the opportunity of so proving. By this decision the court does not find that they will succeed, but only that they have the right to present their claims for adjudication.

Defendant's motion for judgment on the pleadings is denied. Plaintiff's motion to strike defendants' preemption defenses is granted. An appropriate order will issue.

**APPENDIX E — EXTENSION OF TIME TO FILE DATED  
NOVEMBER 21, 1990**

SUPREME COURT OF THE UNITED STATES

No. A-389

Antonio Cipollone, Individually and as Executor of the Estate  
of Rose D. Cipollone,

Petitioner,

v.

Liggett Group, Inc. et al.

**ORDER**

UPON CONSIDERATION of the application of counsel for  
the petitioner,

IT IS ORDERED that the time for filing a petition for a  
writ of certiorari in the above-entitled case, be and the same is  
hereby, extended to and including December 28, 1990.

/s/ David H. Souter  
Associate Justice of the Supreme  
Court of the United States

Dated this 21 day of November, 1990.



**APPENDIX F — RELATED CASE IN CONFLICT WITH  
CIPOLLONE: FORSTER, ET AL. V. R.J. REYNOLDS  
TOBACCO CO., ET AL.**

**John Forster, et al., Respondents, v. R.J. Reynolds Tobacco  
Company, Petitioner, Appellant, Erickson Petroleum  
Corporation, d.b.a. Holiday Station Stores, Inc., petitioner,  
Appellant**

**No. C1-87-2170**

**Supreme Court of Minnesota, En Banc**

**April 14, 1989, Filed**

**PRIOR HISTORY:** Review of Court of Appeals.

**SYLLABUS:**

Under the Federal Cigarette Labeling and Advertising Act, state tort claims based on a state-imposed duty to warn are impliedly preempted; other state tort claims are not preempted.

Affirmed in part, reversed in part, and remanded for further proceedings.

**COUNSEL:** James S. Simonson, Minneapolis, MN, John L. Strauch, William T. Plesac, Cleveland, OH for R.J. Reynolds Tobacco Company; Mark A. Gwin, Minneapolis, MN for Erickson Petroleum Corporation

Michael L. Weiner, Minneapolis, MN for John Forster, Et al.

Amicus Curiae: Alan B. Morrison, Washington, DC for Amer. Cancer Society, Amer. Heart Assoc., Amer. Lung Assoc.,

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Amer. Public Health Assoc., and Public Citizen; Michael V. Ciresi, Roberta P.B. Walburn, Mpls, MN for MN Trial Lawyers Assoc; Hubert H. Humphrey, III, Attorney General, Peter M. Ackenberg, Special Assistant Attorney General, St. Paul, MN for State

JUDGES: SIMONETT, Justice, Heard, considered, and decided by the court en banc.

OPINION BY: SIMONETT

SIMONETT, Justice

The trial court ruled that plaintiff's suit claiming cancer from cigarette smoking was barred by federal preemption. The court of appeals reversed. We affirm in part and reverse in part.

Plaintiff John Forster has sued defendant R.J. Reynolds Tobacco Company and Erickson Petroleum Corporation, d.b.a. Holiday Station Stores, Inc., claiming he contracted terminal cancer from smoking Camel cigarettes for 30 years. Mr. Forster alleges he began smoking in 1953 at age 15; that he was persuaded by Reynolds' advertising that cigarette smoking was glamorous and nonhazardous to health; and that by the time he was convinced smoking was unhealthy, he was addicted, and notwithstanding many attempts to overcome the addiction, he was unable to do so. (Since suit was commenced, Mr. Forster has died and the action is to be converted into one for wrongful deaths).

Plaintiff's complaint alleges counts of strict products liability, breach of warranty, and negligence, plus derivative claims for Mrs. Forster's loss of consortium and punitive damages. Defendants moved for summary judgment on the grounds that the Federal Cigarette Labeling and Advertising Act (the Act)

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preempts any state tort claims, and on the further grounds that the complaint fails to state a cause of action under state law for strict products liability. Pretrial discovery was postponed pending disposition of the motion. The trial court granted summary judgment on preemption grounds and did not rule on the other grounds. On appeal, the court of appeals reversed, holding there was no federal preemption. *Forster v. R.J. Reynolds Tobacco Co.*, 423 N.W.2d 691, 696 (Minn. App. 1988). We granted defendants' petition for further review.

Part I of this opinion considers the preemptive implications of the Act. In Part II we apply the conclusions reached in Part I to the various causes of action alleged in plaintiff's complaint.

## I.

In 1965 Congress enacted the Federal Cigarette Labeling and Advertising Act. 15 U.S.C. § 1331-1339 (Supp. V 1965-69). Section 1333 of the Act stated it was unlawful to manufacture or sell cigarettes which did not have conspicuously on the package the warning label: "Caution: Cigarette Smoking May be Hazardous to Your Health." In 1970 Congress amended the Act to change the label to: "Warning: The Surgeon General Has Determined that Cigarette Smoking is Dangerous to Your Health."<sup>1</sup> In 1984, the message on the warning label was again

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1. 15 U.S.C. § 1333 (1970). The 1970 amendment also gave the Federal Trade Commission authority to require the same warning label in cigarette advertising after July 1, 1971. See 15 U.S.C. § 1336 (1982). In addition, all cigarette advertising on television and radio was banned after January 1, 1971. See 15 U.S.C. § 1335 (1982).

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escalated.<sup>2</sup> Defendant Reynolds has complied with the Act's warning requirements. It claims the Congress, in fashioning this elaborate warning scheme, has preempted the field of cigarette regulation so that cigarette manufacturers are immune from state tort claims for injuries to health from using their product. 15 U.S.C. § 1333(a)(1) (Supp. 1984).

We need, therefore, to examine the federal legislation to determine if Congress, either expressly or impliedly, intended to preempt state tort claims. The section of the 1965 Act, entitled "preemption," stated:

(a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

(b) No statement relating to smoking and health,

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2. Cigarette manufacturers were required to rotate four different warning labels on their packages of cigarettes. The four warnings were:

SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.

SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.

SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight.

SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

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shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

(c) Except as is otherwise provided in subsections (a) and (b) of this section, nothing in this chapter shall be construed to limit, restrict, expand, or otherwise affect, the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes . . .

15 U.S.C. § 1334 (1965) (amended 1984). In 1970, subparagraph (b) was amended to read:

(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334(b) (1970) (emphasis added).

Contrary to defendants' contention, we do not think any of the above quoted language expressly preempts a state common law tort action. The phrase "requirement or prohibition . . . imposed under State law" is too obscure for us to say that it is an express declaration that state common law tort actions are preempted. Express preemption requires Congress to speak plainer.

The issue before us, then, is whether federal preemption is to be implied. Under our system of federalism, it is assumed that Congress in legislating does not intend to hobble the states in their regulation of matters of state concern. *See Maryland v.*

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*Louisiana*, 451 U.S. 725, 746 (1981). This state has a vital interest in protecting the health and safety of its citizens. *See, e.g., Pikop v. Burlington N.R.R. Co.*, 390 N.W.2d 743, 753 (Minn. 1986), *cert. denied*, 480 U.S. 951 (1987). Our state constitution affirms the importance of our citizens having legal redress when harmed. Minn. Const. art. I, § 8 ("Every person is entitled to a certain remedy in the laws for all injuries or wrongs . . .").

Consequently, if federal preemption is to be implied, congressional intent to do so must be clearly inferred, either from the extent of federal involvement or from the scope of the federal interest; and even then the state will be preempted only to the extent that state regulation "actually conflicts" with federal law. *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). A conflict arises if compliance with both state and federal law is a physical impossibility (not the case here), or if state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* We must determine, then, if allowance of state common law tort actions would frustrate the objectives of the federal Act.

Congress has clearly stated the federal interest in cigarettes and health. The declaration of policy in the Act proclaims the purpose of the legislation is "to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health." The Act goes on to say that the federal program is established so that

1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and



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2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331 (Supp. V 1965-69) (amended 1984).

First of all, it seems to us that Congress has decided that even though cigarette smoking is addictive and hazardous to health, cigarettes may be lawfully marketed if labeled as congress dictates. This policy represents a balance or compromise between the national interest in protecting health by not smoking and the national interest in protecting commerce and the country's tobacco economy. Congress has struck this balance by warning people they should not smoke if they value their health but leaving the decision whether to smoke up to them. In order that "the public may be adequately informed" of the health hazards of smoking, Congress has provided a warning "to that effect." Further, Congress has reserved to itself what this warning will say and where it must be placed. In other words, Congress has declared its warning is an adequate warning and only its warning need be given. Finally, Congress has said it does not want diverse, nonuniform, and confusing cigarette labeling and advertising regulations.

Reynolds argues that this "comprehensive Federal program" preempts any state tort claim based on a duty to warn; further, it bars any state tort based on false or misleading representations or false advertising; and, further, it preempts any state tort claim based on strict products liability for defective manufacture, design, or failure to warn. Reynolds relies on the leading case of *Cipollone*

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v. *Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 464 U.S. 1043 (1987), which holds that the federal Act preempts those state tort claims "that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes." *Id.* at 187 (citation omitted). Courts from other jurisdictions have followed *Cipollone*<sup>3</sup>.

Because the cigarette manufacturer has complied with the federal duty to warn, a state tort claim for failure to warn must be based on a duty to give a warning different than the warning under federal law. If state claims are allowable, the jury on each state claim reevaluates the federal duty in terms of a state standard of adequacy and assesses tort damages against a manufacturer found to be wanting. This, we think; constitutes a state-imposed regulatory scheme superimposed on the federal scheme. *Cf. San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) (compensatory damages can be a potent method of governing conduct and controlling policy" and cannot be used "to regulate activities that are potentially subject to the exclusive federal regulatory scheme"). Here, the state tort claim regulatory scheme would directly conflict with one of the announced purposes of the Act, namely, to avoid "diverse, nonuniform, and confusing" regulations relating to cigarette smoking and health, and would effectively dismantle the federal plan. *See Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 626 (1st Cir. 1987). Congressional intent to obviate this dismantlement is further evident in section

3. Three other federal courts of appeal have followed *Cipollone*, namely, *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230 (6th Cir. 1988); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987); and *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987). Also in accord is *Dewey v. Brown & Williamson Tobacco Corp.*, 542 A.2d 919, 225 N.J. Super. 375 (1988).

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1334(b) which says no requirement or prohibition relating to smoking and health shall be imposed under state law with respect to the advertising or promotion of cigarettes.

As we understand plaintiffs and amici,<sup>4</sup> they do not claim that state tort claims based on inadequate warning would not conflict with the federal Act; rather, they argue this conflict is acceptable to Congress, and, in any event, the conflict is incidental in its impact. We disagree.

Plaintiffs cite *Silkwood*, where the United States Supreme Court permitted a state punitive damages claim to be brought even though it conflicted with the federal safety regulatory scheme for nuclear facilities under the Atomic Energy Act. The Court said this "consequence was something that Congress was quite willing to accept." *Silkwood*, 464 U.S. at 256. In making this statement, however the Court had in mind an amendment to the law (the Price-Anderson Act), where congress obviously assumed that persons injured in nuclear accidents were free to pursue state tort remedies, at least those of a compensatory nature. *Id.* at 251-52. See also, *Gryc v. Dayton-Hudson Co.*, 297 N.W.2d 727 (Minn.), cert. denied, 449 U.S. 921 (1980) (where this court observed that the Flammable Fabrics Act had been amended to expressly confirm that a pajama manufacturer's compliance with federal consumer safety rules did not relieve the manufacturer of liability at common law or under state statute). Reynolds, on the other hand, cites *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), where the Court held that a state action for

4. We have received amicus briefs from the State of Minnesota, American Cancer Society, American Heart Association, American Lung Association, American Health Association, Public Citizen, and Minnesota Trial Lawyer's Association.

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Lake Champlain was impliedly preempted by the Clean Water Act. Our reading of these cases and others persuades us that each case turns on the particular legislative history involved.

We find nothing in the legislative history of the Labeling Act and its amendments which tells us Congress thought that state tort claims could be maintained when in actual conflict with the federal law. This, too, has been the conclusion of the other courts which have looked at the legislative history. See, e.g., *Palmer*, 825 F.2d at 623 (legislative history of the Act contains "contradictory, even self-serving language"). The best indication of congressional intent, we think, is what congress said in the statute. Congress said it wanted to avoid diverse, nonuniform, and confusing regulations. This statement of intent is at odds with plaintiffs' claim that Congress contemplated a diversity of conflicting state regulations coexisting with the federal regulatory scheme, or that congress intended its warning to be a minimal warning to which a state could add further requirements.<sup>5</sup>

5. Plaintiffs' and amici's reliance on *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir.), cert. denied, 469 U.S. 1062 (1984), is misplaced. The D.C. Circuit held that a state tort action for inadequate warning on a pesticide container with a warning label approved by the Environmental Protection Agency was not preempted by the federal law. Although the case has language favorable to our plaintiffs here, the case is distinguishable on several grounds. For example, the pesticide statute said, "A State may regulate the sale or use of any federally registered pesticide . . ." *Id.* at 1421. There was no declaration in the pesticide statute, as in the Cigarette Labeling Act, that its purpose was to avoid diverse or nonuniform regulation. Indeed, under the pesticide statute, it was incumbent on the manufacturer to obtain federal approval of its warning label and, if the label were later found to be deficient—such as in state tort claim—the manufacturer could petition the EPA to revise the label. *Id.*



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We hold, therefore, that state tort claims based on a state-imposed duty to warn are impliedly preempted. In this connection, it should be noted that the Act does not preclude cigarette manufacturers from advertising and promoting their product. When they do so, they are not required to expand on the federal warning label; the Act says that label suffices. The Third Circuit in *Cipollone* says "the propriety of a party's actions with respect to the advertising and promotion of cigarettes" is also preempted. *Cipollone*, 789 F.2d at 187. We are unclear what this means. Presumably the Third Circuit had in mind the interplay of section 1334(b); namely, that with respect to advertising and promotion, insofar as it relates to smoking and health, "[n]o requirement or prohibition shall be imposed under State law . . . ." As we read the Act, the bedrock on which implied preemption rests is the avoidance of a conflict between a state claim and the federal warning label. Consequently, any state claim that questions the adequacy of cigarette advertising or promotion with respect to smoking and health, or which questions the effect of that advertising or promotion on the federal label, is preempted.<sup>6</sup>

This brings us to Reynolds' next argument that state tort claims based on the "defective condition" of the product are also preempted. This argument assumes the real thrust of plaintiffs' lawsuit is that cigarettes are by nature "defective" and should not be sold, that plaintiffs' claims are really an attempt to outlaw cigarettes by means of state tort actions. To allow state tort actions to be used in this manner, argues Reynolds, would destroy the balance struck by Congress to permit cigarettes to be lawfully

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6. An affirmative misrepresentation with respect to smoking and health which occurs in advertising or promotion would not necessarily implicate the federal label and, therefore, would not be preempted. See discussion in Part II, *infra*.

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sold if they carry the federal warning label; therefore, all state tort claims must be preempted. This argument, we think, claims too much for state common law tort actions. Those who urge plaintiffs to sue may hope that as a byproduct of state tort litigation, cigarette manufacturers will go out of business, but the tort actions themselves are not based on any claim that the sale and use of cigarettes is prohibited by law. The state claims are to be resolved under common law principles of liability. Therefore, aside from the duty to warn, there is no federal preemption for claims based on a "defective condition" of the product.

## II.

We need now to discuss preemption with specific reference to each cause of action alleged in plaintiffs' complaint.<sup>7</sup>

Our case comes to us on a grant of summary judgment by the trial court; however, no factual record has been developed and we have basically only the claims as alleged, often quite vaguely, in the complaint. While we consider these claims in light of our ruling on the preemptive effect of the Act, we realize there are gray areas left for the trial court on remand, areas that can only be resolved after plaintiffs have better shaped their causes of action, both in their pleadings and on the facts.

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7. In *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986), the issue of preemption arose on plaintiff's motion to strike the defendant's affirmative defense of federal preemption. In denying the motion to strike, the appellate court was not required to apply its general holding to the specific tort claims alleged, leaving that job to the trial court. For the aftermath, see *Cipollone v. Liggett Group, Inc.*, 649 F.Supp. 664 (D. N.J. 1986) and *Cipollone v. Liggett Group, Inc.*, 683 F.Supp. 1487 (D. N.J. 1988).



## Appendix F

## Strict Liability

Plaintiffs' first count alleges defendants, in selling and advertising cigarettes, failed to warn adequately of the adverse health consequences; that they promoted and advertised their product so as to "neutralize" any warning; that their product presented a risk of harm greater than any social utility; that the product was represented as safe for use; that the product was in a defective condition unreasonably dangerous for use; and, hence, defendants "are strictly liable in tort." This rather expansive notion of strict liability is best considered by breaking it down into its components.

First of all, a claim is made in strict liability for failure to warn. Our recent cases have tended to consider failure to warn in product cases as more akin to negligence. See, e.g., *Bilotta v. Kelley Co.*, 346 N.W.2d 616, 622 (Minn. 1984). In any event, for reasons already given, we hold that plaintiffs' cause of action for failure to warn is preempted.

Count One next claims strict liability for a product defective under a risk-utility analysis. In this state we use a risk-utility balancing test to determine if a product liability claim will lie for a design defect. See *Bilotta*, 346 N.W.2d 616. Reynolds argues that this theory of recovery is preempted because Congress has already made its own risk-utility decision and has allowed cigarettes to be used. This congressional policy decision is not, however, what products liability has in mind. Strict liability assumes the product is useable and asks only if it has been safely designed. So understood, we see no conflict between the state tort action and the Act. We hold that plaintiffs' claim in strict liability for unsafe design is not preempted. The complaint also alleges that defendant's product was in a defective condition unreasonably

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dangerous for use. It is unclear what plaintiffs have in mind here, but if plaintiffs can prove a defective condition or a defective design—apart from any claim of inadequacy of warning—we see no conflict with the federal Act.<sup>8</sup>

Finally, Count One alleges that the product was represented as safe for use and was advertised as safe and nonhazardous. This allegation does not really sound in strict liability; although sparsely pleaded, it appears plaintiffs are asserting a cause of action for intentional misrepresentation. The claim, it should be noted, is not for fraudulent concealment of information which would really be a variation of the duty to warn and hence preempted. It is based, rather, on affirmative statements made which are allegedly untrue. Such a claim would not be preempted. If the cigarette manufacturer chooses to provide further information on smoking as it relates to health, these statements, if they meet the requirements for a common law misrepresentation action, would be actionable. See *Davis v. Re-Trac Mfg. Corp.*, 276 Minn. 116, 149 N.W.2d 37 (1967). The action is based on a duty to tell the truth, not on a duty to warn. Misrepresentation is concerned with the truthfulness of what one says; the duty to warn assumes truthfulness and is concerned with how much of what is truthful must be disseminated. Concededly, a false representation (e.g.,

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8. The claims of unsafe design and defective condition remain exposed to defendants' asserted defense, yet to be ruled on, that they fail to state a claim for relief under state law. Defendants, for example, point to the discussion of a defective condition for food and drink products in *Restatement (Second) of Torts* § 402A (1965). The Restatement takes the position that products like tobacco and whiskey, though addictive and harmful to health, are not "defective," unless foreign substances are added. *Id.* comment i. In any event, the parties have not yet set out their positions on unsafe design and defective condition beyond the pleading stage. All that is before us now and all that we decide is that federal preemption does not apply to these claims.

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"smoking will not cause emphysema") conflicts with the federal warning label. But the cause of action, in a preemption sense, does not lie in challenging the adequacy of the federal warning nor in claiming a dilution of that warning, but only in asserting the falsity of what the cigarette manufacturer has chosen to say. To the extent there is a "conflict," it is indirect and self-imposed by the cigarette manufacturer. To find in this situation an implied preemption, we would have to assume that Congress intended the Act to be a license to lie, an assumption both uncharitable to Congress and violative of this state's deep concern for honesty as well as health.

Indeed, it is clear Congress did not intend cigarette advertisers to be free to engage in deceitful advertising practices because it expressly provided in the Act for the Federal Trade Commission to act in such instances. Section 5(b) of the 1965 Act. *Cf. Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). Nor do we think that a state tort action for misrepresentation conflicts with FTC regulation; the two remedies can exist comfortably together. So long as plaintiff does not claim the advertising was deceptive because it did not adequately warn, the claim for misrepresentation is not preempted. Interestingly, in the Cipollone trial following remand, a claim for intentional misrepresentation was submitted to the jury. *Cipollone v. Liggett Group, Inc.*, 683 F.Supp. 1487, 1499-1500 (D. N.J. 1988).

## Breach of Warranty

The second count simply repeats the allegations of the first count and says they constitute breaches of express and implied warranty. The warranty claims are similar to strict liability; hence, our foregoing analysis governs. To the extent a breach of warranty is based on a duty to warn it is preempted; otherwise it remains

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viable, subject, of course, to any applicable state law defenses.

By way of illustration, compare a 1961 pre-Act case, *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961). There the defendant's ad said, "A good cigarette can cause no ills . . ." and "Nose, throat and accessory organs not adversely affected by smoking Chesterfields." The Third Circuit in *Pritchard* held that a cause of action would lie for breach of express warranty. *Id.* at 296. As indicated in our discussion above on misrepresentation, a similar warranty claim today would not be preempted by the Act.

## Negligence

The third count alleges "defendants were negligent in the manufacture, sale, and advertising" of Camel cigarettes. The pleading does not explain what is meant by a negligent sale, nor by negligent advertising. In any event, the same rulings as above apply. To the extent negligence is claimed to be breach of a duty to warn about the hazards of smoking, it is preempted.

## Other Counts

Plaintiffs' fourth count for Mrs. Forster's loss of consortium is a derivative action and needs no independent discussion. The fifth count is for punitive damages. A claim for punitive damages in this state is not an independent tort. *See Jacobs v. Farmland Mutual Ins. Co.*, 377 N.W.2d 441, 445 (Minn. 1985). If the issue of punitive damages is reached, failure to warn cannot be used as a factor bearing on punitive damages.

Finally, the complaint does not allege separate causes of action accruing prior to the enactment of the 1965 Labeling Act. The

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complaint does allege, however, that Mr. Forster began smoking in 1953, and apparently he claims he became addicted to cigarettes prior to the enactment of the 1965 Labeling Act. The Act does not specifically provide for retroactive preemptive effect. Consequently, we hold that the federal Act does not preempt a pre-1966 claim based on failure to warn. *See Kotler v. American Tobacco Co.*, 665 F.Supp. 15 (D. Mass. 1988). Reynolds does not disagree that pre-1966 claims are viable but argues that they suffer from fatal problems of causation and must fail as a matter of state law. Issues of state law defenses are not, however, before us.

Affirmed in part, reversed in part, and remanded for further proceedings.

**APPENDIX G — RELATED CASE IN CONFLICT WITH  
CIPOLLONE; DEWEY ET AL. v. R.J. REYNOLDS TOBACCO  
CO., ET AL.**

577 A.2d 1239

CLAIRE E. DEWEY, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF WILFRED E. DEWEY, DECEASED, PLAINTIFF-RESPONDENT AND CROSS-APPELLANT, v. R.J. REYNOLDS TOBACCO CO., DEFENDANT-INTERVENOR, AND R.J. REYNOLDS INDUSTRIES, INC., AMERICAN BRANDS, INC., (FORMERLY THE AMERICAN TOBACCO COMPANY, INC.), DEFENDANTS, AND BROWN & WILLIAMSON TOBACCO CORPORATION, DEFENDANT-APPELLANT AND CROSS-RESPONDENT.

Argued January 18, 1989—Decided July 26, 1990

*Martin London*, argued the cause for appellant and cross-respondent (*Norris, McLaughlin & Marcus*, attorneys; *William C. Slattery*, on the briefs).

*Peter N. Perretti, Jr.*, argued the cause for defendant-intervenor (*Riker, Danzig, Scherer, Hyland & Perretti*, attorneys; *Peter N. Perretti, Jr.* and *Alan E. Kraus*, on the brief).

*Marc Z. Edell* argued the cause for respondent and cross-appellant (*Budd, Lerner, Gross, Picillo, Rosenbaum, Greenberg & Sade* and *Wilentz, Goldman & Spitzer*, attorneys; *Marc Z. Edell* and *Alan Darnell*, of counsel; *Marc Z. Edell, Alan Darnell*, and *Cynthia A. Walters*, on the briefs).

*Adam S. Henschel* submitted a brief on behalf of *amicus curiae*, Association of Trial Lawyers of America, New Jersey Chapter (*Greenberg & Prior*, attorneys; *William S. Greenberg*,



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of counsel; *William S. Greenberg and Adam S. Henschel*, on the brief).

The opinion of the Court was delivered by

CLIFFORD, J.

This products-liability case poses two troubling questions: (1) whether the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-40 (1982 & Supp. III 1985) (hereinafter Cigarette Act), preempts plaintiff's claims, and (2) whether the recently-enacted New Jersey Products Liability Law, *N.J.S.A. 2A:58C-1 to 7* (hereinafter Products Liability Law) is applicable retroactively and renders a surviving claim invalid as a matter of law. The Law Division entered an order of partial summary judgment in favor of defendant Brown & Williamson Tobacco Co. *Dewey v. R.J. Reynolds Tobacco Co.*, 216 N.J. Super. 347, 358, 523 A.2d 712 (1986). On the parties' interlocutory appeal and cross-appeal the Appellate Division affirmed. *Dewey v. Brown & Williamson Tobacco Co.*, 225 N.J. Super. 375, 542 A.2d 919 (1988). We granted both plaintiff's and Brown & Williamson's motions for leave to appeal, 113 N.J. 379, 550 A.2d 481 (1988). We now answer the two questions posed above in the negative.

## I

In 1982 plaintiff, Claire Dewey, individually and as executrix of her husband's estate, sued R.J. Reynolds Tobacco Co., R.J. Reynolds Industries, Inc., American Brands, Inc., and Brown & Williamson Tobacco Co. Plaintiff's complaint alleged that her husband had developed lung cancer from smoking defendants' cigarettes from 1942 until eight months before his death in 1980. Count one asserted general theories of design defect, including

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a claim of inadequate warning, and count two alleged theories of fraud and misrepresentation in advertising. Counts three and four were derivative.

During discovery, plaintiff disclosed that her husband had not smoked defendant Brown & Williamson's cigarettes ("Viceroy") until 1977, thirty-five years after he had started to smoke and eleven years after Congress had enacted the Cigarette Act, which requires that each package of cigarettes carry a warning of the alleged health hazards of smoking. See 15 U.S.C. § 1333. Brown & Williamson then moved for summary judgment on two grounds: (1) that the Cigarette Act preempted all of plaintiff's claims, and, alternatively, (2) that the complaint was deficient as a matter of New Jersey substantive law because comment i of Section 402A of the *Restatement of Torts (Second)* (hereinafter Restatement) bars the imposition of strict liability for a product "whose danger is contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics\* \* \*."

The trial court dismissed so much of the first count of plaintiff's complaint as alleged liability for failure to warn, and the entire second count, which alleged fraud and misrepresentation in advertising, on the ground that the Cigarette Act preempts all those claims. 216 N.J. Super. at 355, 523 A.2d 712. That result was compelled, according to the court, by the Third Circuit's interlocutory decision in *Cipollone v. Liggett Group*, 789 F.2d 181 (1986), cert. denied, 479 U.S. 1043, 107 S.Ct. 907, 93 L.Ed.2d 857 (1987), which held that the federal Cigarette Act impliedly preempted state-law damage actions that challenge "either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes." 789 F.2d at 187 (footnote omitted). The Third

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Circuit reaffirmed its preemption decision in post-trial proceedings in *Cipollone v. Liggett Group*, 893 F.2d 541, 581-82 (1990), with Chief Judge Gibbons concurring "only because this panel is bound" by what he perceived as the court's previous "erroneous opinion." *Id.* at 583.

The trial court in this case, however, did not dismiss plaintiff's design-defect claim on preemption grounds. The court believed that "*Cipollone* made clear that the regulatory scheme of the [Cigarette] Act and the federal interest involved was not so pervasive as to preclude all tort remedies which a plaintiff in smoking and health-related litigation may have under state law." 216 N.J.Super. at 356, 523 A.2d 712. Plaintiff could pursue a design-defect claim by showing, under the "risk-utility" test for determining design defect, that the risks posed by cigarettes outweighed their utility. She did not have to prove the existence of an alternative, safer design. *Ibid.* The court made no mention of the impact of comment i of *Restatement* Section 402A on the claim that survived preemption.

The Appellate Division affirmed substantially for the reasons expressed by the trial court, subject to "such modifications as intervening law makes necessary," 225 N.J.Super. at 377, 542 A.2d 919. Specifically, the Appellate Division modified the trial court's decision regarding the design-defect claim by stating that the principles of comment i of the *Restatement* Section 402A were applicable to the case pursuant to N.J.S.A. 2A:58C-3a(2), the "defenses" section of the Products Liability Law. *Id.* at 385, 542 A.2d 919. Thus, the court had "no quarrel with defendant's proposition that plaintiff may not recover if a factfinder concludes that the death of her decedent was caused in large measure from exposure to the danger inherent in all cigarettes, a danger acknowledged to be within his contemplation of an ordinary

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consumer." *Id.* at 386, 542 A.2d 919. However, that proposition did not compel a legal conclusion that there was no material issue of fact regarding defendant's ability "to minimize the unavoidable [*i.e.* inherent] dangers attendant to cigarette smoking." *Ibid.* (quoting 216 N.J.Super. at 358, 523 A.2d 712). Plaintiff was therefore entitled to present to a factfinder evidence regarding alternative design or, as the Appellate Division described it, evidence "concerning defendant's cigarettes as defendant designed them and decedent smoked them." *Ibid.* The Appellate Division then summarized its holding by stating that although "the jury should not be asked to compare the risks and utility inherent in cigarette smoking nor to make findings of fact concerning whether decedent was adequately warned of those risks, plaintiff should be permitted to go forward with her cause of action." *Id.* 225 N.J.Super. at 388, 542 A.2d 919.

In addition to granting plaintiff and Brown & Williamson leave to appeal, we allowed defendant R.J. Reynolds Tobacco Company to file a brief and appear as intervenor.

## II

Integral to our analysis is a preliminary determination of whether plaintiff's complaint states a claim for design defect. Although our Rules of Court require that "all pleadings must be construed liberally in the interest of justice, R. 4:5-7, a party's pleadings must nonetheless fairly apprise an adverse party of the claims and issues to be raised at trial." *Miltz v. Borroughs-Shelving*, 203 N.J.Super. 451, 458, 497 A.2d 516 (App.Div.1985); see also *Hewitt v. Hollohan*, 56 N.J.Super. 372, 377, 153 A.2d 371 (App. Div. 1959), ("a vague complaint, full of generalities, frequently indicates that the pleader has not thought through his cause of action, and does not yet know precisely upon what theory



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he will present his case"). In *Miltz*, for example, the allegation in a complaint that the plaintiff's injuries were proximately caused by the defendant's "failure to install stairs properly," 203 *N.J. Super.* at 458, 497 *A.2d* 516, was insufficient notice of a negligent-inspection theory of the case. In this case defendants similarly assert that they were not aware of plaintiff's claim for design defect until the summary-judgment motion because plaintiff's second amended complaint omitted the term "design defect."

Although the first count of the second amended complaint does not contain the words "design defect," the complaint does allege that defendants' tobacco products "were not reasonably fit, safe and suitable for human use at the time the products were placed in the stream of commerce"—the talismanic language of a strict-liability claim. See *Suter v. San Angelo Foundry & Mach. Co.*, 81 *N.J.* 150, 176, 406 *A.2d* 140 (1979). Immediately following the foregoing language, the complaint asserts that "Defendants further failed to warn the general public and/or Plaintiff's decedent of deleterious, toxic and hazardous nature of their products for numerous years," and that "[t]he unfitness, unsuitableness and unsafeness of the Defendants' products, along with the failure of the Defendants to warn and/or convey an adequate warning caused the Plaintiff's decedent to suffer serious, severe, disabling and permanent injuries and death\* \* \*." (Emphasis added.) The quoted language suggests that plaintiff's complaint alleged two distinct categories of defects: one involving the unsuitability of the product for consumption, the other focusing on the warning label. Contrary to Brown & Williamson's claim, it was therefore apparent on the face of the complaint that plaintiff was asserting more than an inadequate-warning claim. Although more by way of facts regarding the design defect would have been enlightening, see *Rule* 4:5-2, we agree with the Appellate Division's finding

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that "[t]o the extent that plaintiff's complaint was deficient, the judge properly looked to the entire record, giving plaintiff every favorable inference," 225 *N.J. Super.* at 382 n. 5, 542 *A.2d* 919, and that the trial court had correctly concluded that the complaint was sufficient to support a claim of design defect.

## II

## — A —

We turn to the issue of whether the federal Cigarette Act preempts any of plaintiff's common-law tort claims. Defendants contend that although the Appellate Division correctly affirmed the trial court's dismissal of plaintiff's inadequate-warning and fraudulent-advertising claims on preemption grounds, the court should also have held that the Cigarette Act preempts plaintiff's alternative design-defect claim. Plaintiff counters that dismissal, on the basis of preemption, of any of the theories alleged in her complaint would represent a misapplication of United States Supreme Court precedent.

Pursuant to the Supremacy Clause of the United States Constitution, article VI, clause 2, Congress may preempt state common law as well as state statutory law through federal legislation. *Chicago N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 *U.S.* 311, 325-26, 101 *S.Ct.* 1124, 1134, 67 *L.Ed.2d* 258, 270 (1981). The essential question for any preemption analysis is "whether Congress intended that the federal regulation supersede state law." *Louisiana Pub. Serv. Comm'n v. Federal Communications Comm'n.*, 476 *U.S.* 355, 369, 106 *S.Ct.* 1890, 1899, 90 *L.Ed.2d* 369, 382 (1986). That inquiry is simple enough when Congress has expressly defined the extent to which the statute preempts state law. See, e.g., *Schneidewind v. ANR Pipeline Co.*,



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485 U.S. 293, 299, 108 S.Ct. 1145, 1150, 99 L.Ed.2d 316, 325 (1988). Preemption may nevertheless arise "by implication" when, for instance, "the scheme of federal regulation [may be] so pervasive as to make reasonable the inference that Congress left no room for the State to supplement it," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447, 1459 (1947), or when the "object sought to be obtained by federal law and the character of the obligations imposed by it may reveal the same purpose." *Ibid*; see *Exxon Corp. v. Hunt*, 97 N.J. 526, 532-33, 481 A.2d 271 (1984). And even in the absence of express language or implied congressional intent to occupy the field, state law may be preempted "to the extent that it actually conflicts with federal law." *Brown v. Hotel Employees Int'l Union*, 468 U.S. 491, 501, 104 S.Ct. 3179, 3185, 82 L.Ed.2d 373, 383 (1984). Examples of "actual conflict" include instances in which compliance with both state and federal regulations is physically impossible, *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248, 256-57 (1963), or in which state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581, 587 (1941).

Obviously, then, preemption often hinges "on \*\*\* question[s] of statutory construction and interpretation." *Palmer v. Liggett Group*, 825 F.2d 620, 623 (1st Cir. 1987); L. Tribe, *American Constitutional Law* at 479-97 (2nd ed.1988) (discussing preemptive effect of federal legislation on state action). That simple point poses a unique issue in this case, because New Jersey precedent appears to hold that state courts are bound by the federal courts' interpretations of federal statutes, *Southern Pac. Co. v. Wheaton Brass Works*, 5 N.J. 594, 598, 76 A.2d 890 (1950), *cert. denied*, 341 U.S. 904, 71 S.Ct. 614, 95 L.Ed. 1343 (1951), and

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because the Third Circuit has already determined that the Cigarette Act preempts failure-to-warn claims as well as claims challenging the context of cigarette advertising. *Cipollone v. Liggett Group*, *supra*, 789 F.2d at 187. Defendants contend that our task is merely to adopt the Third Circuit's reasoning in *Cipollone*, as did the trial court in this case. See 216 N.J.Super. at 355, 523 A.2d 712. That contention requires us to examine the logic underlying adherence to federal law on the meaning and effect of a federal statute.

In *Wheaton Brass Works*, *supra*, 5 N.J. 594, 76 A.2d 890, this Court resolved a dispute over freight charges under the Interstate Commerce Act. Although stating generally, and perhaps imprecisely, that the case required "consideration of the applicable provisions of the Interstate Commerce Act as construed by the federal courts whose decisions on federal problems are controlling," *id.* at 598, 76 A.2d 890, the Court was clearly referring to the binding nature of the United States Supreme Court cases and not of lower-federal-court cases. See *West Jersey & Seashore R.R. v. Lake & Rively Co.*, 105 N.J.L. 314, 316, 145 A. 336 (Sup.Ct. 1929); Note, "Authority in State Courts of Lower Federal Court Decisions on National Law," 48 *Colum.L.Rev.* 943, 944-45 n. 15 (1948). Not since *Wheaton Brass* has this Court ever suggested that lower-federal-court decisions on the interpretation of federal statutes are binding as a matter of law. But see *Urban League v. Mayor of Carteret*, 170 N.J.Super. 461, 469, 406 A.2d 1322 (App. Div. 1979) (federal-court decisions on the interpretation of federal statutes are binding precedent), *rev'd on other grounds sub nom. Southern Burlington County N.A.A.C.P. v. Mount Laurel*, 92 N.J. 158, 456 A.2d 390 (1983). Indeed, in *State v. Coleman*, 46 N.J. 16, 214 A.2d 393 (1965), in which this Court declined to follow the Third Circuit's federal-constitutional analysis in *United States ex. rel. Russo v. New*

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*Jersey*, 351 F.2d 429 (1965), we stated generally that

when adjudicating federal questions, the state courts form an integral part of the national structure and that:

In that capacity they occupy exactly the same position as the lower federal courts, which are coordinate, and not superior to them. There is no appeal from the state to the lower federal courts. Instead both are subject to the reviewing power of the Supreme Court, which furnishes the unifying principle. Decisions of a lower federal court are no more binding on a state court than they are on a federal court not beneath it in the judicial hierarchy. [*Id.* 46 N.J. at 37, 214 A.2d 393 (quoting Note, *supra*, 48 Colum.L.Rev. at 946-47).]

Neither *Coleman* nor the article quoted in *Coleman* distinguished between the binding effect of decisions involving constitutional interpretation and those involving statutory interpretation. See, e.g. *Dewey v. Brown & Williamson Tobacco*, *supra*, 225 N.J.Super. at 378, n. 2, 542 A.2d 919. Consequently, we reject any such distinction, and clarify that in neither situation are the decisions of the lower federal courts "binding" *per se*.

Instead, the operative principle that informs the discussion is the principle of "judicial comity." Stated simply, lower-federal-court decisions in this area should be accorded due respect, particularly where they are in agreement. See, e.g., *State v. Norflett*, 67 N.J. 268, 286, 337 A.2d 609 (1975). By helping to ensure uniformity, judicial comity discourages forum shopping.

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Hence, starting with a brief review of the Cigarette Act, we undertake an independent analysis of the federal scheme.

— B —

Perhaps, the most significant event that precipitated the Cigarette Act was the 1964 Surgeon General's Advisory Committee Report, which authoritatively concluded that "[c]igarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." H.R.Rep. No. 449, 89th Cong., 1st Sess. 1, reprinted in 1965 "U.S.Code Cong. & Admin. News" 2350, 2351. Specifically, the report found that smoking was related to lung cancer, chronic bronchitis, emphysema, cardiovascular diseases, and cancer of the larynx. The report also concluded that "overwhelming evidence indicates that smoking—its beginning, habituation, and occasional discontinuation—is to a large extent psychologically and socially determined." *Id.* at 2357. Public response to the report was "immediate and vocal." *Palmer v. Liggett Group*, *supra*, 825 F.2d at 622. "[I]n a rush to protect and inform [their] citizens," several states adopted mandatory warning labels for cigarette packages. *Ibid.*

The Federal Trade Commission also responded to the Surgeon General's Advisory Committee report by immediately issuing a notice of proposed rulemaking that would have required a warning to be placed both on packages of cigarettes and in all advertising. See *Banzhaf v. F.C.C.*, 405 F.2d 1082, 1089 (D.C.Cir. 1968), cert. denied, 396 U.S. 842, 90 S.Ct. 50, 24 L.Ed.2d 93 (1969). Concerned about the potential maze of conflicting regulations, Congress intervened in 1965 to set up a uniform system of warning labels for cigarettes.

Among the significant provisions of the Cigarette Act is the



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statement of policy and purpose, which originally provided:

It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

(1) The public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.  
[15 U.S.C. § 1331.]

Changes to subsection (1) made in 1984 are not relevant to this appeal.

Section 1333 of the Cigarette Act prescribes the exact language to be placed on the warning label. The label required in the original 1965 enactment was: "Warning: The Surgeon General Has Determined That Cigarette Smoking May Be Dangerous To Your Health." 15 U.S.C. § 1333 (1965). That warning was subsequently strengthened in 1970 to read: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health." 15 U.S.C. § 1333 (1970). A 1984 revision to that section requires four rotating warnings that specifically describe the

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hazards attendant to smoking. 15 U.S.C. § 1333 (1984). Thus, the tentative message of the 1965 warning has been replaced by stronger assertions of the dangers of smoking.

Also relevant is the Cigarette Act's preemption section, which provided originally that "no statement relating to smoking and health, other than the statements required by section 1333 of this title, shall be required on any cigarette package." 15 U.S.C. § 1334. That preemption provision was amended in 1970 to include additional language:

(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

— C —

Because we do not write on a clean slate, we briefly examine the slate as it comes to us, beginning with the Third Circuit's decision in *Cipollone v. Liggett Group, supra*, 789 F.2d 181. There the court began its analysis by upholding the district court's conclusion that the preemption provision contained in 15 U.S.C. § 1334 did not expressly preempt plaintiff's state common-law claims. *Id.* at 185. The court explained that although the preemption provision explicitly prohibits states and federal agencies from requiring any additional warning on cigarette packages, no language refers to the viability of state common-law claims. *Id.* at 185-86. That lack of express guidance, combined with the strong presumption against preemption where state police powers are involved, see *Maryland v. Louisiana*, 451 U.S. 725, 101 S.Ct. 2113, 2128, 68 L.Ed.2d 576, 595 (1981), militated against a finding



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of express preemption. *Id.* at 186; accord *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230, 234 (6th Cir.1988); *Palmer v. Liggett Group*, *supra*, 825 F.2d at 625.

Consequently, the court examined the principles of implied preemption. As a preliminary matter, the court observed that although informative, the "vast" legislative history of the Cigarette Act was not "wholly dispositive of the issue." 789 F.2d at 186. According to the court, the language of the statute was "itself a sufficiently clear expression of congressional intent," making resort to the Act's legislative history unnecessary. *Ibid.*

The Third Circuit focused first on the form of implied preemption commonly known as "occupation of the field." Although Congress clearly intended to occupy a field, as evidenced in both the preemption provision and the statement-of-purpose section of the Act, the court found that the scheme created is not "'so pervasive' [n]or the federal interest 'so dominant' as to eradicate all of the Cipollones' claims." *Ibid.* The court was also unpersuaded that the object of the Act and the character of obligations imposed by it "reveal a purpose to exert exclusive control over every aspect of the relationship between cigarettes and health." *Ibid.* Critical to that finding was the need for a "restrained view" of Congressional intent to preempt the field, because plaintiff's tort action concerned "rights and remedies traditionally defined solely by state law." *Ibid.*

The *Cipollone* court then turned to the second form of implied preemption, termed "actual conflict," which occurs when state law creates "an obstacle to the execution of the full purposes and objectives of Congress." *Id.* at 187 (quoting *Hines v. Davidowitz*, *supra*, 312 U.S. at 67, 61 S.Ct. at 404, 85 L.Ed. at 587). According to the court, the Cigarette Act "represents

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a carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the national economy." *Ibid.* Allowing state-law damage claims to proceed would "upset" that balance by effectively requiring manufacturers to change their warning labels. *Ibid.* Consequently, the Court concluded that the Cigarette Act preempts "state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes." *Ibid.* (footnote omitted). In addition, it found that the Act preempts all state-law damage claims that necessarily depend on a duty to provide an adequate warning. *Ibid.*

The *Cipollone* rationale found favor with four federal circuit courts: the first, *Palmer v. Liggett Group*, *supra*, 825 F.2d 620; fifth, *Pennington v. Vistrion Corp.*, 876 F.2d 414 (1989); sixth, *Roysdon v. R.J. Reynolds Tobacco Co.*, *supra*, 849 F.2d 230, and eleventh, *Stephen v. American Brands*, 825 F.2d 312 (1987). There is a consensus, then, at least among federal courts, that the imposition of state tort liability for failure to warn would jeopardize the "delicate" balance of policies enumerated in the Cigarette Act. See, e.g., *Palmer v. Liggett Group*, *supra*, 825 F.2d at 626 ("[i]t is inconceivable that Congress intended to have that carefully wrought balance of national interests superseded by the views of a single state, indeed, perhaps a single jury in a single state"). The *Palmer* court stated that "[t]o permit the imposition of state common law actions into a well-defined area of federal regulation would abrogate utterly the established scheme of health protection as tempered by trade protection." *Ibid.*

It should be noted, however, that two of the federal circuit court opinions were reversals of lower-court decisions that had concluded that the Cigarette Act had no preemptive effect. See

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*Palmer v. Liggett Group*, 633 F.Supp. 1171 (D.Mass.1986), *rev'd*, 825 F.2d 620 (1st Cir.1987); *Cipollone v. Liggett Group*, 593 F.Supp. 1146, 1157-63 (D.N.J.1984), *rev'd*, 789 F.2d 181. Finding those lower-court decisions to represent the sounder position regarding preemption, the Minnesota Court of Appeals likewise rejected the preemption defense. *Forster v. R.J. Reynolds Tobacco Co.*, 423 N.W.2d 691 (1988), *rev'd*, 437 N.W.2d 655 (Minn.1989).

Specifically, the intermediate appellate court in *Forster* disagreed with the federal Circuit Courts' approach to preemption, concluding that the traditional presumption against preemption is "heightened" by the following four factors: (1) the Cigarette Act does not explicitly preempt state tort claims, *id.* at 696; (2) the matter involves the state police powers of protecting the health and safety of the public, *id.* at 696-98; (3) the legislative history of the Cigarette Act, which the Third Circuit completely disregarded in *Cipollone*, indicates that Congress did *not* intend to supersede the traditionally state-run area of tort compensation, *id.* at 698-99; and (4) preemption, given its drastic consequences, would effectively eliminate all means of recourse for the plaintiff. *Id.* at 700. The court concluded that "at the very heart of our ruling is the firm conviction that if there is a need to immunize the tobacco industry from tort liability, that decision must be made by Congress in an unambiguous mandate and *not* by the courts." *Id.* at 701.

Like the trial-court decisions in *Cipollone* and *Palmer*, the Minnesota Court of Appeals decision in *Forster* was eventually reversed on appeal. 437 N.W.2d 655. The reason for the reversal, the Minnesota Supreme Court explained, was that the imposition of state tort damages for failure to warn "would directly conflict with one of the announced purposes of the Act, namely, to avoid 'diverse, nonuniform, and confusing' regulations relating to

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cigarette smoking and health, and would effectively dismantle the federal plan." *Id.* at 659.

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In deciding the preemption issue, we first point out that "the settled mandate" governing preemption of matters traditionally under state supervision "is not to decree such a federal displacement 'unless it was the clear and manifest purpose of Congress.'" *Florida Lime & Avocado Growers v. Paul*, *supra*, 373 U.S. at 146, 83 S.Ct. at 1219, 10 L.Ed.2d at 259 (quoting *Rice v. Santa Fe Elevator Corp.*, *supra*, 331 U.S. at 230, 67 S.Ct. at 1152, 91 L.Ed. at 1459). Stated differently, "we are not to conclude that Congress legislated the ouster of [traditional common-law remedies] in the absence of an *unambiguous* congressional mandate to that effect." *Id.* 373 U.S. at 146-47, 83 S.Ct. at 1219, 10 L.Ed.2d at 159 (emphasis added); *see, e.g., Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715, 105 S.Ct. 2371, 2376, 85 L.Ed.2d 714, 722 (1985) (presumption exists that state and local regulation of health and safety matters can constitutionally coexist with federal regulation); *Hines*, *supra*, 312 U.S. at 75, 61 S.Ct. at 408, 85 L.Ed. at 591 (Stone, J., dissenting) (courts must adequately "safeguard against \* \* \* diminution of state power [founded on] vague inferences as to what Congress might have intended if it had considered the matter"); *MacGillivray v. Lederle Laboratories*, 667 F.Supp. 743, 745 (D.N.M. 1987) ("[i]t would be rare indeed to infer an intent to supersede tort actions involving rights and remedies traditionally defined exclusively by state law"); Sunstein, "Interpreting Statutes in the Regulatory State," 103 *Harv.L.Rev.* 405, 417 (pointing to "shared understandings about the limited preemptive effect of federal enactments").

The preemption arguments advanced by defendants are premised not on a clear showing of congressional intent but rather



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on dubious inferences and assertions. We agree with those courts that hold that the Cigarette Act neither expressly preempts common-law remedies nor impliedly preempts those remedies by pervasively occupying the field of law. Nor is there any indication that compliance with both state and federal law is impossible. See *Pennington v. Vistrion Corp.*, *supra*, 876 F.2d at 418-21; *Roysdon v. R.J. Reynolds Tobacco Co.*, *supra*, 849 F.2d at 234; *Palmer v. Liggett Group*, *supra*, 825 F.2d at 625-26; *Cipollone v. Liggett Group*, *supra*, 789 F.2d at 185-87; *Forster v. R.J. Reynolds*, *supra*, 437 N.W.2d at 659-60. We part company, however, with the cited cases to the extent that they conclude that state-law claims for inadequate warning "actually conflict" with the purposes of the Cigarette Act.

Preemption by "actual conflict," as explained in *Hines v. Davidowitz*, *supra*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581, occurs in those instances in which, as a result of the operation of state law, "the purpose of the [federal] act cannot otherwise be accomplished—[] its operation within its chosen field else must be frustrated and its provisions be refused their natural effect \* \* \*." *Id.* at 68 n. 20, 61 S.Ct. at 404 n. 20, 85 L.Ed. at 587 n. 20. In contrast to express and implied preemption, the "actual conflict" analysis is "more an exercise of policy choices by a court than strict statutory construction." *Abbot by Abbot v. American Cyanamid Co.*, 844 F.2d 1108 (4th Cir.1988). The test is straightforward: first, a court must consider the purposes of the federal law, and second, it must evaluate the effect of state law on those purposes. *Finberg v. Sullivan*, 634 F.2d 50, 63 (3rd Cir.1980). Actual conflict must be more than "hypothetical" or "potential." *Rice v. Norman Williams Co.*, 458 U.S. 654, 659, 102 S.Ct. 3294, 3299, 73 L.Ed.2d 1042, 1049 (1982).

The Cigarette Act's statement of policy and purpose

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announces two separate goals: (1) "to adequately inform[] [the public] that cigarette smoking may be hazardous to health by [the] inclusion of a warning to that effect on each package of cigarettes," and (2) to protect "commerce and the national economy \* \* \* to the maximum extent *consistent* with this declared policy [by] not imped[ing it with] diverse, nonuniform, and confusing cigarette labeling and advertising regulations." 15 U.S.C. § 1331 (emphasis added). It is significant that the second goal, the protection of trade and commerce, must be achieved "consistent with" and not "to the detriment of" the first and principal goal—to inform the public adequately that cigarettes may be hazardous to health. H.R.Rep. No. 449, 89th Cong., 1st Sess. a, *reprinted in* "1965 U.S.Code Cong. & Admin.News" 2350 (noting that the Act's "principal purpose" was to "provide adequate warning to the public of the potential hazards of cigarette smoking by requiring the labeling of cigarette packages with the [warning]"). Moreover, the secondary goal focuses on the need for uniform labeling and advertising *regulations* as a way of protecting commerce and the national economy; but does not go so far as to restrict the rights of injured consumers.

The question here is whether state common-law tort remedies will have the effect of creating "an obstacle to the accomplishment and execution of [those] purposes." *Hines*, *supra*, 312 U.S. at 67, 61 S.Ct. at 404, 85 L.Ed. at 587. It is clear that the allowance of such remedies will further, not impair, the goal of adequately informing the public of the risks of cigarette smoking. It is instead the second federal goal—the protection of trade and commerce through uniform regulations—that according to defendants will be thwarted if tort claims are allowed to proceed. Specifically, defendants contend that the practical effect of a tort damage award is that it "imposes" a "requirement" on the manufacturer to change its warning label from the one federally prescribed, because



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"[o]nce a jury has found a label inadequate under state law, and the manufacturer liable for damages for negligently employing it, it is unthinkable that any manufacturer would not immediately take steps to minimize its exposure to continued liability." *Palmer v. Liggett Group, supra*, 825 F.2d at 627-28. According to defendants, preemption occurs because the incidental regulatory pressure exerted by a jury verdict would necessarily conflict with the goal of uniform regulations.

In other contexts the United States Supreme Court has commented on the regulatory effect of state damage actions. For example, in holding that the provisions in the National Labor Relations Act preempted a state common-law action for business losses associated with union picketing, the Court stated:

Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventative relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy \* \* \*.

[*San Diego Trades Council v. Garmon*, 359 U.S. 236, 246-47, 79 S.Ct. 773, 780, 3 L.Ed.2d 775, 784 (1959).]

The quoted language has limited applicability, however, in view of the presumption in favor of federal preemption where the National Labor Relations Board (NLRB) is involved. *Brown v. Hotel Employees, supra*, 468 U.S. at 502, 104 S.Ct. at 3185, 82 L.Ed.2d at 384. The *Garmon* Court was also concerned that the

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primary jurisdiction of the NLRB would be impaired if litigants were permitted to sidestep its remedial scheme by pursuing state-law claims.

More recently in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984), the United States Supreme Court decided that the Atomic Energy Act, 42 U.S.C. §§ 2011-2284 (1982 & Supp. III 1985), did not preempt a state-authorized award of punitive damages even though the Act exclusively regulated the field of nuclear safety. In rejecting defendant's argument that the imposition of punitive damages would be tantamount to imposing a safety regulation, the Court stated:

It may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards, but that regulatory consequences was something that Congress was quite willing to accept. [*Id.* at 256, 104 S.Ct. at 625, 78 L.Ed.2d at 457.]

*Silkwood* is relevant because it suggests that Congress may be willing to tolerate the regulatory consequences of the application of state tort law even where direct state regulation is preempted. See, e.g., *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 186, 108 S.Ct. 1704, 1712, 100 L.Ed.2d 158, 171 (1988) ("Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not"). And just this term in *English v. General Electric Co.*, \_\_\_ U.S. \_\_\_, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990), the Court held that a nuclear-plant employee's state-law claim for intentional infliction of

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emotional distress based on employer's alleged retaliatory firing for plaintiff's "whistleblowing" did not conflict with federal regulations or specific remedies of the Energy Reorganization Act, despite tangential effect on their purposes, and hence was not preempted by federal law. Both *Silkwood* and *English*, therefore, pose an obstacle to defendants' "actual conflict" analysis, which is premised solely on the assertion that Congress could never have intended to tolerate such tension. See also *Cipollone*, *supra*, 789 F.2d at 187 (because several Supreme Court opinions recognize the regulatory effect of state-law damage claims, see, e.g., *Garmon*, *supra*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775, state-law claims arising under the Cigarette Act are *ipso facto* preempted). We refuse to accept that assumption as the foundation for an "unambiguous Congressional mandate" to preempt state common law.

Instead, in order to determine whether the goal of uniformity will be impaired, we prefer to scrutinize the actual extent to which state-law damage claims have a "regulatory effect". Although liability may indirectly provide incentives to change behavior, the form of such change is never dictated by a court unless, of course, it be by way of injunctive or declaratory relief. *Cipollone v. Liggett Group*, *supra*, 593 F.Supp. at 1154; see also Garner, "Cigarette Dependency and Civil Liability: A Modest Proposal," 53 S.Cal.L.Rev. 1423, 1454 (1980) ("a damages award \* \* \* requires only payment—it is not an injunction requiring the defendant to incorporate into its advertising a fixed legend different from the federally required label"). In this case a manufacturer that incurs a judgment of liability may change its conduct by (1) adding an additional warning (which would not be barred under the Cigarette Act because the preemption section provides that no statement shall be "required," hence, there is no prohibition against a manufacturer "voluntarily" saying more); or (2) placing

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a package insert in the product, as has been done with a multitude of products; or (3) simply choosing to do nothing and risking exposure to liability. "The decision \* \* \* to choose whichever path is most prudent—is up to the industry. In either case, as long as it continues to meet the requirements of Federal law, it is free to meet its state-imposed obligations to its customers as it sees fit." Tribe, "Federalism With Smoke and Mirrors," *The Nation*, June 7, 1986, at 788. Defendants overstate the regulatory pressure that state-law damage claims would generate.

More significantly, defendants' analysis completely ignores the fact that state-tort claims advance a substantial goal apart from regulating behavior: to provide compensation to those injured by deleterious products when that result is consistent with public policy. See, e.g., *Feldman v. Lederle Laboratories*, 97 N.J. 429, 461, 479 A.2d 374 (1984) ("[T]here is a strong state interest in compensating those who are injured by a manufacturer's defective products"); *O'Brien v. Muskin Corp.*, 94 N.J. 169, 179, 463 A.2d 298 (1983) (strict liability is premised on a shared concern about allocating the risk of loss on those in the stream of commerce for injuries sustained from unsafe products); *Suter v. San Angelo Foundry & Mach. Co.*, *supra*, 81 N.J. at 173, 406 A.2d 140 ("Strict liability \* \* \* is but an attempt to minimize the costs of accidents and to consider who should bear those costs"). That goal was similarly iterated in *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, *cert. denied*, 469 U.S. 1062, 105 S.Ct. 545, 83 L.Ed.2d 432 (1984), in which a worker alleged that Chevron, despite compliance with the labeling requirements of the Federal Insecticide Fungicide and Rodenticide Act, 7 U.S.C. § 136-136y ("FIFRA"), had failed adequately to warn that long-term skin exposure to paraquat could cause serious lung disease. In response to Chevron's argument that FIFRA preempts state tort suits for inadequate warnings, the court found that state tort law "may have broader

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compensatory goals" than the federal scheme, and that

even if the ultimate purposes of federal and state law in this area are the same, a state (acting through its jurors) may assign distinct weight to the elements which go into determining whether a substance as labelled is of sufficient net benefit as to warrant its use. \* \* \* [Thus] a state may choose to tip the scales more heavily in favor of the health of its citizens than EPA is permitted to by FIFRA. [736 F.2d at 1540].

In rejecting Chevron's contention that the exclusive "regulatory aim" of FIFRA would be frustrated by state damage actions, the court stated:

Damage actions typically, however, can have *both* regulatory and compensatory aims. Moreover, these aims can be distinct; it need not be the case, as Chevron apparently assumes, that the company can be held liable for failure to warn only if the company could actually have altered its warning. \* \* \* In this case, a Maryland jury found that the EPA-approved label did not sufficiently guard against certain injuries. Even if Chevron could not alter the label, Maryland could decide that, as between a manufacturer and an injured party, the manufacturer ought to bear the cost of compensating for injuries that could have been prevented with a more detailed label that that approved by the EPA. That is, Maryland can be conceived of as having decided that, if it must abide by EPA's determination that a label is adequate,

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Maryland will nonetheless require manufacturers to bear the risk of any injuries that could have been prevented had Maryland been allowed to require a more detailed label or had Chevron persuaded EPA that a more comprehensive label was needed. [Id. at 1541 (emphasis added).]

Similarly, in this case, a New Jersey jury could decide that a cigarette manufacturer, rather than an injured party, ought to bear the cost of injuries that could have been prevented with a more detailed warning label than that required under the Cigarette Act. Cf. *Freund v. Cellofilm Properties, Inc.*, 87 N.J. 229, 238 n. 1, 432 A.2d 925 (1981) (explaining different approaches in inadequate-warning cases). We think that our citizens are entitled at least to the opportunity to present such a claim.

Like cigarettes, paraquat has been "extensively regulated since 1966 by the federal government." *Ferebee v. Chevron Chem. Co.*, *supra*, 736 F.2d at 1532. The insecticide can be sold in the United States only when accompanied by a label approved by the EPA. *Id.* at 1539. Moreover, FIFRA contains a preemption section, which provides that a "State shall not impose or continue in effect any requirement for labeling\* \* \* in addition to or different from those required under this subchapter." 7 U.S.C. § 136v(b). No doubt such a provision was intended to promote a similar goal of uniformity.

The *Ferebee* case prompts an additional observation: defendants' "implied preemption through incidental regulatory effect" analysis is equally applicable to the myriad of other federal labeling statutes and regulations that have as their foundation an express or implied goal of uniform labeling. The United States Food and Drug Administration (FDA), for example, prescribes



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warnings to be used on oral contraceptives to ensure that patients are "fully informed of the benefits and risks involved in the use of these drugs," 43 *Fed.Reg.* 4220 (1978); 21 *C.F.R.* § 310.501(a)(1984), and requires "precise and nationally uniform" labeling in that respect. 21 *C.F.R.* § 301.501(a)(2)(1) (1984). Defendants' analysis could just as easily apply to those regulations and thereby shield drug manufacturers from liability based on their compliance with labeling requirements, notwithstanding the fact that contraceptive users may not have been warned of the inherent risks of the product. Compliance with FDA labels on oral contraceptives, however, does not shield manufacturers from liability. *MacDonald v. Ortho Pharmaceutical Corp.*, 394 Mass. 131, 475 N.E.2d 65, 70 (1985).

Another analogous statute is the Federal Hazardous Substances Act (FHSA), 15 U.S.C. § 1261 et seq., which requires that hazardous household substances sold in interstate commerce have a label containing specific warnings and instructions. 15 U.S.C. § 1261(p), 1262, 1263. That Act provides that states may not establish or continue "a requirement applicable to such substance \* \* \* unless such requirement is identical to the warning established pursuant to the Act." Pub.L. 94-284, § 17(a), 90 Stat. 510 (1976). Defendants' argument suggests that complicity with the FHSA would preclude a finding of negligence for failure to give additional warnings. The FHSA, however, prescribes only the minimum warning. It does not immunize the manufacturer of a hazardous product from failure to supply an adequate warning. *Burch v. Amsterdam Corp.*, 366 A.2d 1079, 1085 (D.C.1976).

Finally, defendants contend that the Cigarette Act preempts plaintiff's design-defect claims because those claims would necessarily disturb the balance struck by Congress between its

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concern for the health of Americans and for the health of the tobacco industry. We find no legislative or judicial support for the proposition that Congress engaged in its own risk-utility analysis and decided that cigarettes were not defectively designed.

We are persuaded by the view most forcefully stated by Solicitor General Kenneth Starr, in his unpublished monograph "The Law of Preemption," that "[o]ur federal system, with its high regard for the several States' powers of governance, requires that judges not preempt state laws lightly." *Id.* at 61. Judge Starr recalls Justice Frankfurter's observation that when the Supreme Court considers whether the Congress has preempted state law, "[a]ny indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority." *Id.* at 86 [quoting *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 780, 67 S.Ct. 1026, 1033, 91 L.Ed.2d 1234, 1249 (1947)]. We are convinced that had Congress intended to immunize cigarette manufacturers from packaging, labeling, misrepresentation, and warning claims, it knew how to do so with unmistakable specificity.

We hold that the Cigarette Act does not preempt plaintiff's claims.

## III

We focus now on the second issue on this appeal, namely, whether the New Jersey Products Liability Law, which is N.J.S.A. 2A:58C-3a(2) provides a defense to manufacturers and sellers for harms caused by products whose dangerous propensities are known to the ordinary user, can retroactively insulate these defendants from liability for design defects inherent in their cigarettes.

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New Jersey's tort-reform statute, which became effective after the trial court's decision in this case, was intended to "establish clear rules [in] actions for damages for harm caused by products, including certain principles under which liability is imposed and the standards and procedures for the award of punitive damages." *N.J.S.A. 2A:58C-1*. The Products Liability Law was not intended to "codify all issues relating to product liability, but only to deal with matters that require clarification." *Ibid.* The Products Liability Law leaves unchanged the three theories under which a manufacturer or seller may be held strictly liable for harm caused by a product—defective manufacturers, defective design, and defective warnings—as well as the definition of duty: "a manufacturer or seller of a product shall be liable \* \* \* if the product causing the harm was not reasonably fit, suitable or safe for its intended purpose." *N.J.S.A. 2A:58C-2*, see *Suter v. San Angelo Foundry & Mach. Co.*, *supra*, 81 N.J. at 169, 406 A.2d 140.

The new statute, however, establishes new rules regarding the burden of proof and the imposition of liability. Those changes are not to be applied to products-liability actions instituted on or before the date of enactment, a category that includes this case. *L.1987, c. 197, § 8*. That provision reinforces the presumption in New Jersey favoring the prospective application of a statute, *Gibbons v. Gibbons*, 86 N.J. 515, 432 A.2d 80 (1981), as well as the requirement that "a statute [that] changes the settled law and relates to substantive rights is prospective only, unless there is an unequivocal expression of contrary legislative intent." *Pennsylvania Greyhound Lines v. Rosenthal*, 14 N.J. 372, 381, 102 A.2d 587 (1954). More importantly, it simplifies the issue of retroactivity because the only inquiry is whether section 3a(2) is a codification of existing common law or a "new rule" of strict tort liability for defective products. This Court's precedent

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persuades us that *N.J.S.A. 2A:58C-3a(2)* is a "new rule."

Section 3a(2) provides in part as follows:

a. In any product liability action against a manufacturer or seller for harm allegedly caused by a product that was designed in a defective manner, the manufacturer or seller shall not be liable if:

\* \* \*

(2) The characteristics of the product are known to the ordinary consumer or user, and the harm was caused by an unsafe aspect of the product that is an inherent characteristic of the product and that would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the class of persons for whom the product is intended, except that this paragraph shall not apply to industrial machinery or other equipment used in the workplace and is not intended to apply to dangers posed by products such as machinery; or equipment that can feasibly be eliminated without impairing the usefulness of the product.

The foregoing "hybrid" provision combines the "consumer expectations" doctrine for determining whether a product is defective, see *O'Brien, supra*, 94 N.J. at 182, 463 A.2d 298, with the obvious-danger factor of the risk-utility analysis, see *Campos v. Firestone Tire & Rubber Co.*, 98 N.J. 198, 206-07, 485 A.2d 305 (1984), to create a defense to a design-defect claim. In enacting that provision, the legislature drastically changed the method of

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analyzing products-liability cases. Specifically, the provision has overturned so much of our decisions in *Suter v. San Angelo Foundry & Mach. Co.*, *supra*, 81 N.J. at 170-71, 406 A.2d 140, and *O'Brien v. Muskin Corp.*, *supra*, 94 N.J. at 181-82, 463 A.2d 298, as endorsed the application of the "risk-utility" analysis when a plaintiff is unable to establish a defect under the "consumer expectations" test. That change is easily demonstrated by the trial court's opinion in this case, which relied on *O'Brien* to allow plaintiff's claim to proceed on a risk-utility theory irrespective of whether the "consumer expectations" test was satisfied:

In *O'Brien*, the Supreme Court endorsed the use of risk-utility analysis since it "provides the flexibility necessary for an appropriate adjustment of the interests of manufacturers, consumers and the public." 94 N.J. at 183, [463 A.2d 298]. Moreover, the *O'Brien* court made clear that in a design-defect case containing a claim that a product is unavoidably unsafe, manufacturers cannot insulate themselves from liability merely by placing warnings on their products [216 N.J. Super. at 357, 523 A.2d 712.]

Hereafter, under the Products Liability Law, the consumer-expectations test cannot be avoided in a claim for design defect.

Section 3a(2) also modifies the method of analyzing "obvious danger" as established in *Campos v. Firestone Tire & Rubber Co.*, *supra*, 98 N.J. 198, 485 A.2d 305:

Although some jurisdictions have adopted an "obvious danger rule" that would absolve a manufacturer of a duty to warn of dangers that

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are objectively apparent, in our state the obviousness of a danger, as distinguished from a plaintiff's subjective knowledge of a danger, is merely one element to be factored into the analysis to determine whether a duty to warn exists. [*Id.* at 207, 485 A.2d 305.]

Instead of representing a single factor in analysis, "obvious danger" has now been transformed into a defense, except in instances involving industrial machinery or other workplace equipment. See *Suter v. San Angelo Foundry & Mach. Co.*, *supra*, 81 N.J. at 160-68, 406 A.2d 140.

Defendant's argument that section 3a(2)'s adoption of *Restatement* Section 402A's comment i represents a mere codification of New Jersey common law, and hence is entitled to retroactive application, likewise must fall. Comment i defines the term "unreasonably dangerous" by stating that

[m]any products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk or harm, if only from over-consumption. \* \* \* That is not what is meant by "unreasonably dangerous" in this Section. *The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.* \* \* \* Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous.



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The “good tobacco” example included in comment i has never been adopted by this Court. Even though in *Cepeda v. Cumberland Engineering Co.*, 76 N.J. 152, 170, 386 A.2d 816 (1978), this Court stated in *dicta* that comment i

explains that the qualification “unreasonably dangerous” was meant to negate the notion that products normally useful, such as sugar, whiskey, tobacco, or butter, could be regarded as defective because, if used improperly, excessively or in an adulterated condition, they could also be harmful.

The Court never embraced that proposition as a statement of New Jersey law. See *Suter, supra*, 81 N.J. at 187, 406 A.2d 140 (concurring opinion) (in *Cepeda* the Court’s “definitional treatment of ‘defective condition unreasonably dangerous’ [did not] rest in any measure on Comments g and i of Res.2d sec. 402A”). Moreover, the only element of comment i that appears to have survived *Suter* is the “consumer expectations” test itself. The language “defective condition unreasonably dangerous,” which comment i was intended to define, has been struck from this State’s legal vocabulary, *Suter, supra*, 81 N.J. at 175, 406 A.2d 140, because the terminology imposed an unwarranted “dual burden” on the plaintiff to prove both “defective condition” and “unreasonably dangerous.” *Id.* at 175, 406 A.2d 140. That terminology seemed to suggest

that recovery in a products liability action should be permitted *only* if a product is more dangerous than that contemplated by the average consumer, [which would] permit the low esteem in which the public might hold a dangerous product to diminish the manufacturer’s responsibility for injuries

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caused by that product. [*Barker v. Lull Eng’g Co., Inc.*, 20 Cal.3d 413, 425, 573 P.2d 443, 451, 143 Cal. Rptr. 225, 233 (1978)]

Indeed, if any trend is apparent, it is this Court’s reluctance to adhere to the restrictive language in comment i’s formulation of strict liability, which would of course include the “good tobacco” example.

As a last resort, defendants turn to the legislative history of the Products Liability Law to support its assertion that comment i in its entirety has been embraced by this Court. The Assembly Insurance Committee Statement to Senate, No. 2805, explains that

certain provisions of the act simply codify the existing common law of the State, which should continue to apply in pending cases as well as new cases. For example, section 2 states that the burden is on the claimant in a product liability action to prove by a preponderance of the evidence that the product is defective. This is the rule under the existing common law. *Similarly, the New Jersey courts have adopted certain provisions of the commentary to the American Law Institute’s “Restatement (Second) of Torts,” (e.g., comments i and k to section 402A) that are codified in this act. (Emphasis added.)*

Defendants add that even if the Assembly Insurance Committee was incorrect in its assessment of the common law, its statement must be construed as evidence of the legislature’s intent that section 3a(2) apply to pending cases—an argument that the federal district court in *Cipollone* found persuasive, despite that court’s conclusion

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that N.J.S.A. 2A:58C-3a(2) did not codify existing common law. See *Cipollone v. Liggett Group*, *supra*, 893 F.2d at 577.

Putting aside the legislature's interpretation of common law, the Assembly Insurance Committee Statement is not inconsistent with our position. Citing comment i as an example, it asserts that certain provisions in the *Restatement's* commentary were adopted prior to the Products Liability Law. As previously discussed, in *Suter*, *supra*, 81 N.J. at 171, 406 A.2d 140, this Court did adopt comment i to the extent that it encompassed the "consumer expectations" test. Because we read the Assembly Committee's Statement as no more than an acknowledgement of that fact, we do not find support for the assertion that a wholesale adoption of comment i is mandated by the Committee's innocuous reference.

Having concluded that section 3a(2) of the Products Liability Law does not codify existing common law, and hence is inapplicable, we are left with the remaining argument that as a matter of public policy this Court should immunize cigarette manufacturers from liability for the harm caused by their products by finding that no duty exists. See, e.g., *Cepeda v. Cumberland Eng'g Co.*, *supra*, 76 N.J. at 173, 386 A.2d 816 ("before determining whether the case for liability should be given to the jury[,] the trial court should give consideration to whether a balanced consideration of factors did not preclude liability as a matter of law"). That argument has two premises: first, the public has long been aware of the health risks of smoking because of advocacy campaigns and the efforts of the United States Surgeon General. See, e.g., *Roysdon v. R.J. Reynolds Tobacco Co.*, *supra*, 623 F.Supp. at 1192, (taking judicial notice of the widespread public understanding of the dangers inherent in smoking and concluding that plaintiffs did not make a *prima facie* case that cigarettes are defective), *aff'd*, 840 F.2d 230. See generally *Crist*

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& Majoras, "The 'New Wave' in Smoking and Health Litigation—Is Anything Really So New?," 54 *Tenn.L.Rev.* 551, 554-58 (arguing that the "long-term and widespread awareness" of the risks attributed to cigarettes precludes any finding that cigarettes are defective). Second, because consumers are aware of the risks of smoking, they are the cheapest cost-avoiders.

Defendants' argument completely ignores the extensive efforts of the tobacco manufacturers to saturate the public with information regarding the benefits of cigarette smoking, the aim of which is to rebut the assertions of public-health advocates and the Surgeon General. We note that in the ensuing quarter-century since the 1964 Surgeon General's Advisory Committee Report, government interest in the societal cost and hazards of smoking has not abated. A bill recently introduced in Congress would provide for grants for advertisements to discourage smoking, the sponsor charging that "tobacco companies target[] women, teenagers and minority groups for their new products and advertising." *New York Times*, Feb. 21, 1990, at A18. Public opinion surveys as well as Federal Trade Commission reports suggest that the tobacco companies' efforts at rebuttal have been successful, thus raising a material issue of fact regarding consumer awareness of the dangers of smoking. Federal Trade Commission, *Report to Congress, Pursuant to the Federal Cigarette Labeling and Advertising Act*, June 30, 1967. We are unable, therefore, to decide that as a matter of public policy, manufactureres of cigarettes should be immunized from liability for the harms caused by their products. That decision is consistent with the general policy in New Jersey of "liberally favoring jury resolution of defectiveness issues \* \* \* in products liability caes." *Huddell v. Levin*, 537 F.2d 726, 736 (3rd Cir.1976).

In sum, our decision today alters the Appellate Division

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decision by overturning the dismissal of plaintiff's failure-to-warn and misrepresentation claims, because we conclude that the Cigarette Act does not preempt such claims. We agree, however, with the Appellate Division's refusal to apply the "comment i" example relating to tobacco and with its decision to allow plaintiff's design-defect claim to proceed under the risk-utility analysis. We therefore refuse to apply *N.J.S.A. 2A:58C-3a(2)* retroactively to eliminate plaintiff's design-defect claim.

Judgment affirmed in part, reversed in part. We remand the cause to the Law Division.

ANTELL, P.J.A.D. (temporarily assigned), concurring in part, dissenting in part.

I respectfully dissent from the conclusion that the labeling requirement of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C.A. § 1333 (hereinafter "the Act"), does not preempt state court product liability actions based on claims of cigarette-caused injury to health that challenge the adequacy of manufacturers' warnings. I concur with the determination that the "obvious danger"/"consumer expectations" standard contained in the New Jersey Product Liability Act, *N.J.S.A. 2A:58C-3a(2)*, is not applicable to cases such as this which were pending at the time of the statute's enactment. I also concur that the applicability of lower federal court decisions on the question of preemption must be made on principles of judicial comity and not *stare decisis*.

The majority correctly states that in the interpretation of federal statutes principles of comity dictate that lower federal court decisions "be accorded due respect, particularly where they are in agreement. [citation omitted]. Judicial comity helps to ensure

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uniformity and hence discourages forum shopping." From this posture the Court then undertakes its "independent analysis of the federal scheme," and inquiry in which it rejects the well-reasoned, unanimous determinations of the five federal Circuit courts of Appeal and the Supreme Court of Minnesota which all conclude that Congress has preempted the question of adequate warnings concerning the use of cigarettes. So much for comity.

The Act's twofold concern is to inform the public of the health hazards posed by cigarette smoking without exposing "commerce and the national economy" to the confounding effects of "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." 15 U.S.C.A. § 1331. Accordingly, at the time relevant to this case the Act mandated that this be accomplished by requiring that the following statement conspicuously appear on each package of cigarettes: "Warning: The Surgeon General Has Determined That Cigarette Smoking is Dangerous to Your Health." 15 U.S.C.A. § 1333.

15 U.S.C.A. § 1334 is entitled "Preemption." It provides

(a) No statement relating to smoking and health, other than the statement required by Section 1333 of this title, shall be required on any cigarette package.

(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.



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The structure of the majority's holding merits close attention. It rests on the premise that the Act permits the states to compromise the federal goal of protecting commerce and the national economy in order to further inform the public about the hazards of smoking. Its rationale is that the protection of trade and commerce is a "secondary goal" because it "must be achieved 'consistent with' and not 'to the detriment of' the first and principal goal." Therefore, allowing challenges to the adequacy of warnings in state court proceedings does not conflict with the federal statute since its "principal goal" of adequately warning the public will be thereby better served.

As to the "secondary goal" of immunizing the cigarette industry from state regulation, the Court reasons that the impact of adverse jury verdicts based upon inadequate warnings constitutes only incidental regulatory pressure. Because "incidental regulatory pressure is acceptable, whereas direct regulatory authority [such as an injunction or declaratory relief] is not," the Act's prohibition against further regulation is not breached by challenges to the adequacy of warnings in state court product liability actions. The cigarette manufacturer, states the majority, is free to decide how it shall respond to such liability verdicts, that is, whether to modify the warnings or simply ignore the import of the verdicts.<sup>1</sup>

The other justification given for diminishing the protection Congress accorded commerce and the national economy is that it allows for the socially desirable objective of placing the risk of loss upon the one best able to bear it.

1. A choice "akin to the free choice of coming up for air after being under water." *Palmer v. Liggett Group Inc.*, 825 F.2d 620, 627 (1st Cir.1987). The argument was there described as having been "disingenuously" maintained. *Ibid.*

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It can be seen that the Court's holding is vitally dependent upon its assumption that under the Act one goal is subordinate to the other and that state courts may improve upon the warning statements required by Congress at the expense of commerce and the national economy. This is not what the Act says.

In limiting its attention to the statutory condition expressed in 15 U.S.C.A. § 1331 that protection of commerce and the national economy be "consistent with" the policy of adequate warnings, the Court overlooks the larger context of the declared congressional policy. 15 U.S.C.A. § 1331 states that policy "and the purpose of this chapter" to be the establishment of "a comprehensive Federal program to deal with cigarette labeling . . . whereby" the public may be adequately informed and commerce may be protected. The word "whereby," relates to "Federal program." Thus, the Act itself creates the very "program . . . whereby" commerce is given protection "to the maximum extent consistent with" warning the public. It not only sets forth the dual policy in the abstract, but also the bright-line warning language which forms the literal mechanics of its implementation. The preemption declaration of 15 U.S.C.A. § 1334 tells us that Congress wrote the language of the labeling requirement into 15 U.S.C.A. § 1333 to express its exclusive judgment as to how the competing values should be balanced. The Act leaves no doubt as to what warning should be given and how great an intrusion must be tolerated by commerce. Implicit in this is the conclusion that any attempted modification of that balance "under State law" would be in actual conflict with federal law. This is precisely the point of the federal circuit court decisions and the decision of the Supreme Court of Minnesota in *Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655 (1989), in applying the Act's preemption provision.

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In *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 626 (1st Cir.1987), the Court noted that the Cigarette Labeling Act was passed after

a hard-fought, bitterly partisan battle in striking the compromise that became the Act. It is inconceivable that Congress intended to have that carefully wrought balance of national interests superseded by the views of a single state, indeed, perhaps of a single jury in a single state.

It was there held "that a suit for damages on a common law theory of inadequate warning—if the warning given complies with the Act—disrupts excessively the balance of purpose set by Congress, and is thus preempted." *Ibid.* As the Supreme Court of Minnesota reasoned in *Forster, supra*,

The best indication of congressional intent, we think, is what Congress said in the statute. Congress said it wanted to avoid diverse, nonuniform, and confusing regulations. This statement of intent is at odds with plaintiffs' claim that Congress contemplated a diversity of conflicting state regulations coexisting with the federal regulatory scheme, or that Congress intended its warning to be a minimal warning to which a state could add further requirements. [*Forster*, 437 N.W.2d at 660] [Footnote omitted]

See also *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 186 (3d Cir.1986) ("Even more important, we find the language of the statute itself a sufficiently clear expression of congressional intent without resort to the Act's legislative history.")

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The majority states that the Act's "secondary" goal of protecting commerce "focuses on the need for uniform labeling and advertising *regulations* as a way of protecting commerce and the national economy, but does not go so far as to restrict the rights of injured consumers in achieving that goal." The emphasis on "regulations" is presumably used to suggest that the preemption provision is addressed solely to formal regulations promulgated by state administrative or legislative authority.<sup>2</sup> I disagree that Congress intended to shelter cigarette manufacturers only from further governmental regulation but yet leave them answerable to multifarious claims of inadequate warnings limited only by the resourcefulness of counsel and expert witnesses. Such claims would expose the cigarette industry to more "diverse, nonuniform, and confusing cigarette labeling and advertising regulations" that could ever be expected from state governmental authority.

Moreover, claims of inadequate warning asserted in state court liability actions are pernicious in a sense not shared by governmental regulations. They are asserted after the fact, when compliance by the manufacturer is no longer possible to avoid the consequences of a particular suit. Regulations promulgated by state authority, once complied with, impose no duty on a manufacturer to respond in compensatory or punitive damages.

It is obvious that the congressional intent could not have been limited to protecting the industry from state regulatory action

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2. Although the word "regulations" is used in the Act's Declaration of Policy, 15 U.S.C.A. § 1331, the prohibition contained in 15 U.S.C.A. § 1334 is actually more broadly stated to extend to any requirements and statements relating to smoking and health "other than the statement required by section 1333 of this title." It should be noted that the preemption provision of § 1334(b) prohibits any further requirement "under State law." It did not limit itself to statutory law and is plainly intended to encompass judicial determinations.

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while leaving it open to the indirect regulation implicit in product liability suits based on claims of inadequate warning. Both have the proscribed regulatory effect. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246-247, 79 S.Ct. 773, 780, 3 L.Ed.2d 158, 171 (1988) for the proposition that "Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not," that decision more pertinently demonstrates that when Congress chooses to allow for "incidental regulatory pressure" it knows how to do so. It did not do so in this statute. As the Court said in *Cipollone v. Liggett Group, Inc.*, 789 F.2d at 187,

Applying this principle [that State law damage claims have a regulatory effect], we conclude that claims relating to smoking and health that result in liability for noncompliance with warning, advertisement, and promotion obligations other than those prescribed in the Act have the effect of tipping the Act's balance of purposes and therefore actually conflict with the Act.

See also *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230, 234 (6th Cir.1988).

Furthermore, I can make no sense of a federal statute which would preclude state legislatures from requiring further minimal warnings, but allow private litigants to run riot with claims of inadequate warnings—claims which might never have come into existence if local lawmakers had been permitted to act in the first place. Had Congress intended to permit litigants to assert these claims on a case-by-case basis there would be no reason to prohibit state legislatures from requiring warnings, in addition to those specified by the Act, to protect consumers from the very injury

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for which they later sue.

Cases cited by the majority lend no support to its judgment that the Cigarette Labeling Act does not preempt product liability suits based on inadequate warning. In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984), the Supreme Court decided in a five-four decision that a claim for punitive damages in an action for injuries resulting from the escape of nuclear radiation was not preempted by the Federal Atomic Energy Act of 1954, 42 U.S.C.A. § 2011 et seq. The case is distinguishable. First, unlike the Act herein, the Atomic Energy Act contained no preemption provision whatever. *Palmer v. Liggett Group, Inc.*, 825 F.2d at 628. Further, the federal legislation reserved significant regulatory authority to the State. *Ibid.* Also, the defendant there was in violation of the federal statute. Here, it is in compliance. In addition, whereas *Silkwood* was a hapless victim of the nuclear accident, here the decedent voluntarily exposed himself to the risks of smoking in the face of a federally prescribed warning that this would endanger his health.

Finally, in *Silkwood* the Supreme Court specifically found a clear congressional intent that state court tort remedies should remain available to those injured by nuclear incidents. Having done so, it naturally concluded that since punitive damages "have long been a part of traditional state tort law," *Silkwood* 464 U.S. at 255, 104 S.Ct. at 625, 78 L.Ed.2d at 457, they were not preempted by federal law. It should be noted also that unlike jury verdicts which determine the adequacy of labeled warnings and therefore carry a regulatory impact, an award of punitive damages, which addresses a tortfeasor's state of mind and is given consideration only after liability has been determined, has no regulatory effect. In one case a standard is promulgated with which a defendant must comply. In the other, no such standard of



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performance is involved.

While it is true, as the majority states, that *MacDonald v. Ortho Pharmaceutical Corp.*, 394 Mass. 131, 475 N.E.2d 65 (1985), cert. den. 474 U.S. 920, 106 S.Ct. 250, 88 L.Ed.2d 258 (1985), decided that compliance with FDA labels on oral contraceptives does not shield manufacturers from liability, it appears that the label requirements in that case merely took the form of a regulation promulgated by the FDA Commissioner who "specifically noted that the boundaries of civil tort liability for failure to warn are controlled by applicable State law." *Id.* 475 N.E.2d at 70.

In *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C.Cir.1984), cert. den. 469 U.S. 1062, 105 S.Ct. 545, 83 L.Ed.2d 432 (1984), the Court found that plaintiff's claim of inadequate warning had not been preempted by the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C.A. § 136-136y ("FIFRA"), containing labeling requirements complied with by defendant manufacturer. The case differs from this in important respects. There, the federal act "clearly allow[ed] the states to impose more stringent constraints on the use of EPA-approved pesticides than those imposed by the EPA." *Ferebee*, 736 F.2d at 1541. (emphasis in original). Moreover, under that statute each manufacturer was required to submit to the EPA a warning label for each of the approximately forty thousand different herbicides and pesticide formulations covered by the statute for EPA approval. Thus, two manufacturers of the same regulated product could use different labels so long as they were approved by the EPA. See *Palmer v. Liggett Group, Inc.*, 825 F.2d at 628-629, n. 13. The requirement for uniformity in labeling was not a subject of congressional concern and Congress had not taken the trouble, as it did here, to specify the precise warning required.

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Finally, in *Burch v. Amsterdam Corp.*, 366 A.2d 1079 (D.C.Ct. of App.1976), plaintiff was injured in a flash fire when vapors from defendant's product were ignited by a kitchen stove pilot light. The label of the product was appropriately marked with warnings prescribed under the Federal Hazardous Substances Act, 15 U.S.C.A. § 1261(p)(1) (FHSA), which gave notice of its extreme inflammability. Although the Court held that the FHSA did not preempt a state court suit based on failure to warn, unlike the case here there was nothing in that statute from which federal preemption could be implied. The Court made no preemption analysis and stated that it could find "nothing in the statute itself or the legislative history which implies that Congress intended to limit a seller's common law 'duty to warn.'" 366 A.2d at 1085.

In my opinion, by allowing challenges to the adequacy of warnings on cigarette labels the Court is licensing a form of legal sanction forbidden by Congress. The federal legislation gives effect to the coordinate goals of protecting the public with minimal consequences to the cigarette industry. It does this by requiring that consumers be informed that cigarette smoking is "dangerous to your health," reflecting a judgment that this was all an ordinary consumer need know to appreciate the risk of smoking and drawing the line at which personal responsibility begins. Implicit in this choice of words is a recognition that the extent to which the warning can be particularized is infinite and that there are few cases of which it can be said that the manufacturer adequately covered the myriad risk possibilities about which a consumer could claim a warning should have been, but was not, given. Although Congress intended to put the matter to rest, the decision of the majority allows for the very chaos which the Act attempts to resolve. Because this conflict breaches settled principles of federal preemption I would affirm the decision of the Appellate Division

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as to this issue.<sup>3</sup>

*For affirmance in part; for reversal in part; for remandment*—Justices CLIFFORD, HANDLER, O'HERN and STEIN, and Judges KING and COLEMAN—6.

*Concurring in part; dissenting in part*—Judge ANTELL—1.

3. It is not amiss to note that offensive collateral estoppel has been applied in product liability cases to preclude a producer from denying the inadequacy of a warning found inadequate in a previous case in which the producer defended the claim against a different plaintiff. *Ezagui v. Don Chemical Corp.*, 598 F.2d 727 (2d Cir.1979); *Fraleigh v. American Cyanamid Co.*, 570 F.Supp. 497 (D.Colo.1983). Although in *Kortenhuis v. Eli Lilly & Co.*, 228 N.J. Super. 162, 549 A.2d 437 (1982), the Appellate Division concluded that collateral estoppel would be unfair under the facts presented, its potential applicability in a failure to warn case was recognized. For general contours of the doctrine, see *Restatement, Judgments* 2d § 29 at 291 (1982). Its conceivable implication to a cigarette producer is that once its warning is found inadequate, it could be barred from re-litigating the issue in later suits brought by other consumers. Thus, dissolution of the "maximum" protection to which it is entitled would be complete, and the purpose of the federal program, as to that producer, would be nullified.

APPENDIX H — FRONT PAGE OF ARTICLE "CIGARET  
CANCER LINK IS BUNK"

**NATIONAL**  
**ENQUIRER** <sup>15</sup> Why Jackie Will  
Never Remarry

**Most Medical Experts Say:**

**CIGARET  
CANCER  
LINK IS  
BUNK**

**70,000,000 Smokers Falsely Alarmed**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

THOMAS CIPOLLONE,

*Petitioner,*

v.

LIGGETT GROUP, INC., A Delaware Corporation;  
PHILIP MORRIS INCORPORATED, A Virginia Corporation;  
and LOEW'S THEATRES, INC., A New York Corporation,  
*Respondents.*

**On Petition For A Writ Of Certiorari  
To The United States Court of Appeals  
For The Third Circuit**

**MEMORANDUM OF THE RESPONDENTS**

JAMES V. KEARNEY  
WEBSTER & SHEFFIELD  
237 Park Ave.  
New York, NY 10017  
(212) 808-6000

*Attorney for Liggett  
Group, Inc.*

DAVID K. HARDY  
SHOOK, HARDY & BACON  
One Kansas City Place  
1200 Main St.  
Kansas City, MO 64105  
(816) 474-6550

*Attorney for Loew's  
Theatres, Inc.*

MELVIN SPAETH\*  
ARNOLD & PORTER  
1200 New Hampshire Ave., N.W.  
Washington, D.C. 20036  
(202) 872-6669

*Attorney for Philip Morris  
Incorporated*

*\*Counsel of Record*



### QUESTION PRESENTED

Whether the Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1340 (1988), which expressly forbids any legal requirement of a warning on cigarette packages other than that prescribed by Congress, and which also expressly forbids the imposition of any health-related "requirement or prohibition . . . under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter," 15 U.S.C. § 1334, permits courts to impose liability under state law in personal injury lawsuits for alleged inadequacies in the warning label or alleged improprieties in the advertising or promotion of properly labeled cigarettes.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

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No. 90-1038

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THOMAS CIPOLLONE,  
*Petitioner,*

v.

LIGGETT GROUP, INC., A DELAWARE CORPORATION;  
PHILIP MORRIS INCORPORATED, A VIRGINIA CORPORATION;  
AND LOEW'S THEATRES, INC., A NEW YORK  
CORPORATION,  
*Respondents.*

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**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Third Circuit**

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**MEMORANDUM OF THE RESPONDENTS**

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Respondents agree with petitioner that the Court should grant the petition for certiorari in this case.<sup>1</sup>

**OPINIONS BELOW**

The opinions of the court of appeals, Petitioner's Appendix ("Pet. App.") 1a-93a and 95a-108a are re-

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<sup>1</sup> The court may wish to consider the question presented as recast by respondents, which somewhat more accurately describes the conflict in the lower courts and comprehends both issues stated in the petition.

ported at *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541 (3rd Cir. 1990), and *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3rd Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987). The district court's opinion of September 20, 1984, Pet. App. 109a-162a, is reported at *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146 (D.N.J. 1984).

### JURISDICTION

The judgment of the court of appeals was entered on January 5, 1990. The court of appeals denied petitioner's petition for rehearing *in banc* on January 31, 1990. The court of appeals denied respondents' timely petition for rehearing on August 30, 1990. On November 21, 1990, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including December 28, 1990, and the petition was filed on that date. On January 24, 1991, respondents obtained an extension of time within which to file a response to the petition until March 1, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

### STATUTE INVOLVED

The Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1340, is reproduced at Respondent's Appendix ("Resp. App."), at 1a-5a.

### STATEMENT

This diversity action under New Jersey product liability law was initiated by Rose D. Cipollone and her husband, Antonio Cipollone, against Liggett Group,

Inc., Philip Morris Inc., and Loew's Theatres, Inc.<sup>2</sup> Plaintiffs, invoking a variety of product liability theories, alleged that Rose Cipollone developed lung cancer because, for some 40 years, she smoked cigarettes manufactured by respondents.

Respondents raised the defense, among others, that certain of the plaintiffs' claims were preempted by the Federal Cigarette Labeling and Advertising Act (the "Act" or the "Labeling Act"), 15 U.S.C. §§ 1331 *et seq.*<sup>3</sup> That Act specifies the health warning that

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<sup>2</sup> The parties appearing in the United States Court of Appeals for the Third Circuit were Antonio Cipollone, individually and as executor of the estate of Rose D. Cipollone, appellee below, and three cigarette manufacturers: Liggett Group, Inc., Philip Morris Incorporated, and Loew's Theatres, Inc., appellants below. The petitioner for this writ of certiorari is Thomas Cipollone (the alternate executor of the estate of Rose D. Cipollone and the individual allegedly to be substituted as executor for the estate of Antonio Cipollone). All the subsidiaries of Philip Morris Companies Inc., the parent of respondent Philip Morris Incorporated, are wholly-owned. At the time the instant suit was initiated, Lorillard was an unincorporated division of respondent Loew's Theatres, Inc. Thereafter, Lorillard was incorporated as "Lorillard, Inc.", a wholly-owned subsidiary of Loews Corporation, the corporate successor to Loew's Theatres, Inc. Loews Corporation has two subsidiaries that are not wholly-owned by it: CNA Financial Corporation and Bulova Corporation. Respondent Liggett Group, Inc., which has changed its name to Brooke Group Ltd., has three subsidiaries that are not wholly-owned: MAI Systems Corporation, Western Union Corporation and Liggett Myers Tobacco Company of Canada Limited.

<sup>3</sup> Unless otherwise indicated, citations to sections of the Act are to the Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282, as amended by the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat.

must be communicated to the public (§ 1333), provides that "[n]o statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package" (§ 1334(a)), and forbids the imposition "under State law" of any "requirement or prohibition based on smoking and health" with respect to "the advertising or promotion of any cigarettes" labeled in conformity with the Act (§ 1334(b)). It is undisputed that respondents' cigarettes were at all times labeled in conformity with the Act.

The district court (Sarokin, J.) granted plaintiffs' motion to strike the companies' preemption defense. (Pet. App. 109a-162a). The court concluded that the Act's preemption provisions apply to state statutes and regulations, but not to the imposition of damages liability. The court certified the preemption issue for interlocutory appeal under 28 U.S.C. § 1292(b)(1988).

A unanimous panel of the court of appeals reversed (Pet. App. 95a-108a). The court held

that the Act preempts those state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes. We further hold that where the success of a state law damage claim necessarily depends on the assertion that a party bore the duty to provide a warning to consumers in addition to the warning Congress has required

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87, codified at 15 U.S.C. §§ 1331 *et seq.* The Act was further amended in 1984 by the Comprehensive Smoking Education Act, Pub. L. No. 98-474, 89 Stat. 2200.

on cigarette packages, such claims are preempted as conflicting with the Act.

789 F.2d at 187 (Pet. App. 106a). Plaintiffs filed a petition for certiorari in this Court, which was denied (Pet. App. 94a).

On remand, the district court applied the court of appeals' ruling to the theories alleged in the complaint and dismissed some of these as preempted—plaintiffs' post-1965 failure to warn, conspiracy, express warranty, and intentional misrepresentation claims. After presentation of the plaintiffs' case, the court directed a verdict for the defendants on plaintiffs' claim that the defendants failed to use a safer alternative design.

Following a four-month trial, the jury found for defendants on plaintiffs' major claims relating to allegations of pre-1966 fraudulent misrepresentation and conspiracy. The jury found for plaintiffs on the pre-1966 express warranty claim against Liggett. The jury concluded that Rose Cipollone had sustained no damages, but returned a verdict of \$400,000 for Antonio Cipollone. The jury also found that Liggett had failed adequately to warn Mrs. Cipollone of the hazards of smoking for some time prior to January 1, 1966, when the Act's warning labels began to appear on cigarette packages; however, the jury apportioned 80% of the responsibility for Mrs. Cipollone's injuries to her own behavior. It followed that there could be no liability on this claim under New Jersey's comparative fault rules.

All parties appealed. The court of appeals reversed the judgment in favor of Antonio Cipollone on the express warranty claim, holding that the district court's instructions were erroneous. As the petition



indicates, the court of appeals affirmed the district court's ruling that claims based on post-1965 failure to warn and advertising are preempted. The court of appeals also resolved various other issues that are not the subject of the instant petition and remanded for a new trial.

The petition concerns only the court of appeals' affirmance of the district court's ruling that plaintiffs' claims based on post-1965 failure to warn and advertising are preempted.

#### DISCUSSION

The holding of the court below that the Act preempts petitioner's state law claims for allegedly inadequate warnings and improper advertising is plainly correct. Nonetheless, respondents agree with petitioner that the case warrants review by this Court, to resolve a clear conflict among the lower courts.

1. Five federal courts of appeals, as well as several state and federal district courts, have held that the Act preempts certain state law damages actions arising from the labeling, advertising and promotion of cigarettes after January 1, 1966.<sup>4</sup> The court below,

<sup>4</sup> *Kotler v. American Tobacco Co.*, 59 U.S.L.W. 2432 (1st Cir. Dec. 19, 1990); *Pennington v. Vistron Corp.*, 876 F.2d 414 (5th Cir. 1989); *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230 (6th Cir. 1988); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987); *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987); *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987); *Gianitsis v. American Brands, Inc.*, 685 F. Supp. 853 (D.N.H. 1988); *Gun-salus v. Celotex Corp.*, 674 F. Supp. 1149 (E.D. Pa. 1987); *Rogers v. R.J. Reynolds Tobacco Co.*, 557 N.E.2d 1045 (Ind. Ct. App. 1990); *Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655

in the first and leading case on the issue, held that the Act preempts "those state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes." 789 F.2d at 187 (Pet. App. 106a). In contrast, the Supreme Court of New Jersey held in *Dewey v. R. J. Reynolds Tobacco Co.*, 121 N. J. 69, 577 A.2d 1239 (1990) (Pet. App. 208a), that the preemption provisions of the Act apply only to state statutes or regulations, and therefore have no preemptive effect on state law damages actions. A result similar to that in *Dewey* was recently reached by one of the Texas Courts of Appeal. *Carlisle v. Philip Morris Inc.*, No. 3-89-175-CV (Texas Ct. App., 3d Dist., Feb. 6, 1991) (reproduced at Resp. App. 6a-49a).

The issue raised by the petition is important and recurring. There are currently 45 lawsuits pending against cigarette manufacturers on similar claims in state and federal courts sitting in 12 states. In cases filed in federal court, defendant manufacturers have been able to invoke the preemption provisions of the Act. In those cases filed in the state courts of New

(Minn. 1989); *Hite v. R.J. Reynolds Tobacco Co.*, 578 A.2d 417 (Pa. Super. Ct. 1990); *Phillips v. R.J. Reynolds Industries, Inc.*, 769 S.W.2d 488 (Tenn. Ct. App. 1988). In addition to these published opinions, there are also over 15 unpublished orders of state courts following the rulings of the five federal courts of appeals. On February 4, 1991, the Appellate Division of New York affirmed the grant of a motion for summary judgment on the ground of preemption, following the decision of the court below, in *McSorley v. Philip Morris, Inc.*, \_\_\_ N.Y.S.2d \_\_\_ (N.Y. App. Div. 1991) (Westlaw, 1991 WL 15073).

Jersey and one of the appellate districts of Texas, the preemption defense is now not available. This issue is presently before three other state supreme courts.<sup>5</sup> The potential sources of conflicting interpretation could multiply if *Dewey* leads to the filing of many more such cases.<sup>6</sup> This Court's guidance is needed to preserve the uniformity of federal law.

Cases in New Jersey are governed by conflicting law, depending on whether they are filed in federal or state court. This is also true in part of Texas because of the *Carlisle* decision. This creates opportunities for forum shopping,<sup>7</sup> makes it impossible for consumers, retailers, or manufacturers operating in these states to anticipate their rights and obligations, and defeats the ideal reflected in the Rules of De-

<sup>5</sup> *Rogers v. R.J. Reynolds Tobacco Co.*, 557 N.E.2d. 1045 (Ind. Ct. App. 1990); *Gilboy v. American Tobacco Co.*, 572 So.2d 289 (La. Ct. App. 1990); *Hite v. R.J. Reynolds Tobacco Co.*, 578 A.2d. 417 (Pa. Super. Ct. 1990). A review of the *Carlisle* decision will be sought by way of petition to the Texas Supreme Court.

<sup>6</sup> Frankel, *N.J. Tobacco Ruling Issued: Warning Labels Don't Protect Companies, Court Says*, Winston-Salem Journal, July 27, 1990, at 1, 4 (quoting John F. Banzhaf, Executive Director, Action on Smoking and Health) (predicting that *Dewey* "certainly opens the door to thousands, potentially tens of thousands, of suits by smokers and their estates").

<sup>7</sup> For example, one major cigarette manufacturer, R.J. Reynolds, is a New Jersey corporation. No case in which R.J. Reynolds is a defendant can be removed to the federal court in New Jersey under diversity jurisdiction. See Daynard, *Up From the Ashes: Cigarette Litigation and the "Dewey" Decision*, BNA Product Safety and Liability Reporter 1078, 1081 (Sept. 28, 1990). Plaintiffs have in a number of cases in other jurisdictions avoided removal by naming an instate distributor or retailer as a defendant.

cision Act, 28 U.S.C. § 1652 (1988), that substantive law in a jurisdiction be the same whether a case is brought in federal or in state court. See *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring) ("there should not be two conflicting systems of law controlling the primary activities of citizens, for such alternative governing authority must necessarily give rise to a debilitating uncertainty in the planning of everyday affairs").

2. *Dewey* and *Carlisle* rely on the argument that Section 1334 of the Act does not explicitly refer to common law or tort damage actions. But neither does it explicitly reference state statutes and administrative regulations—and all parties and courts agree that those are plainly preempted. What Section 1334(a) of the Act does say is that "[n]o statement relating to smoking and health, other than the statement required by Section 1333 of this title shall be required. . . ." Section 1334(b) states that "[n]o requirement or prohibition based on smoking or health shall be imposed under State law with respect to the advertising and promotion [of properly labelled cigarettes]. . . ." The Act's language covers state law of all kinds bearing on the subjects that Congress reserved to itself—whether of statutory, administrative or common law origin, and whether enforced through fines, injunctions or damage awards.

What is involved here, whether it is called implied or express preemption, is preemption based on the *text* of the Act, including a preemption provision expressly so labeled by Congress. Thus, the preemption that the federal courts of appeals have found is based on the terms of the preemption clauses of the Act, when interpreted in the light of Congress' statement



of policies and purposes in Section 1331. The implied preemption analysis here is nothing other than the process of construing the clear and comprehensive language of Sections 1331 and 1334. Most courts have accordingly found the question controlled by the plain language of the Act. See *Palmer*, 825 F.2d at 626 ("the language of the Act is straightforward and unambiguous"); *Cipollone*, 789 F.2d at 186 (Pet. App. 103a) (the language of the Act provides "a sufficiently clear expression of congressional intent without resort to the Act's legislative history").

The *Dewey* and *Carlisle* courts, notwithstanding the explicit terms of Section 1331, concluded that Congress had only a minor or peripheral concern over protecting commerce. (Pet App. 199a, 218a; Resp. App. 29a-31a). They also concluded that the imposition of tort liability based on claimed inadequacies in the federal warning is not really a "requirement" preempted by the Act because the manufacturers have a "choice" whether to give only the warnings explicitly stated by federal law to be adequate or pay damages for failing to give the variety of additional warnings that judges and juries may deem required under state law. (Pet. App. 202a-203a; Resp. App. 27a-28a). This is the argument that the First Circuit in *Palmer* dismissed as "disingenuous." 825 F.2d at 627. It is axiomatic that there can be no damage liability without breach of a duty imposed by state law. And it is too late in the day to argue that state law does not include common law or that damages actions do not have regulatory effect.<sup>8</sup> In the absence

<sup>8</sup> See *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) (state law includes common law for purposes of federal jurisdiction); *San*

of an express provision preserving private damage actions,<sup>9</sup> this Court has treated common law duties as legal obligations for purposes of preemption.<sup>10</sup>

Congress did not leave to speculation (or "implication") either its essential purposes or the means by

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*Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959) (state regulation "can be as effectively exerted through an award of damages as through some form of preventive relief"); *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) (there is "no reason not to give 'law' its natural meaning" which includes "claims founded upon federal common law as well as those of a statutory origin"); *International Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987) (allowing common law nuisance actions would allow states to "do indirectly what they could not do directly—regulate the conduct of out-of-state sources"); *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 484 (1990) (noting that "state courts, exercising their common law powers, might develop different substantive standards," and that this "outcome is fundamentally at odds with the goal of uniformity that Congress sought to implement").

<sup>9</sup> Even the presence of a savings clause will not preserve state law damage actions that would frustrate the objectives of the federal law (see, e.g., *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220-33 (1986); *Ouellette*, 479 U.S. at 493-95); but where there is no savings clause, there is no ambiguity that preemption of state law includes preemption of state common law. See *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), cert. denied, 100 S. Ct. 1781 (1990).

<sup>10</sup> The cases petitioner relies on (Pet. 15-16) are entirely consistent with this analysis. In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), Congress indicated its express intention to preserve a common law action for damages through the Price-Anderson Act, and the only issue was whether this included punitive damages. In *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 182 (1988), Congress provided "the requisite clear congressional authorization" for enforcement of state workers' compensation laws "in the same way and to the same extent" as other state employers, thus precluding preemption.



which these purposes were to be achieved. Congress declared in Section 1331 that its "policy" and "purpose" in passing the Act was "to establish a comprehensive Federal Program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health." Pursuant to this policy, (1) consumers were to be given what Congress determined to be an adequate warning, and (2) commerce was to be protected "to the maximum extent consistent with this declared policy" and "not impeded by" disuniform and confusing warning and advertising requirements. To achieve these ends, Congress (1) itself specified the exact language of the warning requirement to be included on all cigarette packages; (2) prohibited anyone from requiring any other health warning on cigarette packages; and (3) prohibited anyone from invoking state law for the purpose of imposing any requirement or prohibition relating to smoking and health on the advertising or promotion of cigarettes labeled in compliance with the Act.

Congress' objective applies no less forcefully to regulation through common law requirements imposed through damage awards than to regulation through statutes adopted by state legislatures. By permitting juries to make their own determinations about the adequacy of the congressionally mandated warning and the propriety of advertising and promotional campaigns, the decisions in conflict with the decision below threaten precisely the "diverse, nonuniform, and confusing" results Congress explicitly sought to avoid.

#### CONCLUSION

The petition for a writ of certiorari should be granted.

#### *Of Counsel:*

JAMES V. KEARNEY  
WEBSTER & SHEFFIELD  
237 Park Ave.  
New York, NY 10017  
(212) 808-6000

*Attorney for*  
*Liggett Group, Inc.*

DAVID K. HARDY  
SHOOK, HARDY & BACON  
One Kansas City Place  
1200 Main St.  
Kansas City, MO 64105  
(816) 474-6550

*Attorney for*  
*Loew's Theatres, Inc.*

March 1991

Respectfully submitted,

MELVIN SPAETH\*  
ARNOLD & PORTER  
1200 New Hampshire  
Ave.  
Washington, D.C. 20036  
(212) 872-6669

*Attorney for*  
*Philip Morris*  
*Incorporated*

*\*Counsel of Record*

(4)  
No. 90-1038

Supreme Court, U.S.  
FILED  
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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

THOMAS CIPOLLONE,

*Petitioner,*

v.

LIGGETT GROUP, INC., A Delaware Corporation;  
PHILIP MORRIS INCORPORATED, A Virginia Corporation;  
and LOEW'S THEATRES, INC., A New York Corporation,  
*Respondents.*

On Petition For A Writ Of Certiorari  
To The United States Court of Appeals  
For The Third Circuit

APPENDIX

JAMES V. KEARNEY  
WEBSTER & SHEFFIELD  
237 Park Ave.  
New York, NY 10017  
(212) 808-6000

*Attorney for Liggett  
Group, Inc.*

DAVID K. HARDY  
SHOOK, HARDY & BACON  
One Kansas City Place  
1200 Main St.  
Kansas City, MO 64105  
(816) 474-6550

*Attorney for Loew's  
Theatres, Inc.*

MELVIN SPAETH\*  
ARNOLD & PORTER  
1200 New Hampshire Ave., N.W.  
Washington, D.C. 20036  
(202) 872-6669

*Attorney for Philip Morris  
Incorporated*

*\*Counsel of Record*

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## APPENDIX A

FEDERAL CIGARETTE LABELING  
AND ADVERTISING ACT

15 U.S.C. 1331-1340 (1982)

## § 1331. Congressional declaration of policy and purpose

It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

## § 1332. Definitions

As used in this chapter—

(1) The term "cigarette" means—

(A) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and

(B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A).

(2) The term "commerce" means (A) commerce between any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island and any place outside thereof; (B) commerce between points in any state, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island, but through any place outside thereof; or (C) commerce wholly within the District of Columbia, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island.

(3) The term "United States", when used in a geographical sense, includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, and Johnston Island. The term "State" includes any political division of any State.

(4) The term "package" means a pack, box, carton, or container of any kind in which cigarettes are offered for sale, sold, or otherwise distributed to consumers.

(5) The term "person" means an individual, partnership, corporation, or any other business or legal entity.

(6) The term "sale or distribution" includes sampling or any other distribution not for sale.

(7) The term "little cigar" means any roll of tobacco wrapped in leaf tobacco or any sub-

stance containing tobacco (other than any roll of tobacco which is a cigarette within the meaning of subsection (1)) and as to which one thousand units weigh not more than three pounds.

### **§ 1333. Labeling; requirement; conspicuous statement**

It shall be unlawful for any person to manufacture, import, or package for sale or distribution within the United States any cigarettes the package of which fails to bear the following statement: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health". Such statement shall be located in a conspicuous place on every cigarette package and shall appear in conspicuous and legible type in contrast by typography, layout, or color with other printed matter on the package.

### **§ 1334. Preemption**

#### **(a) Additional statements**

No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

#### **(b) State regulations**

No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

### **§ 1335. Unlawful advertisements on medium of electronic communication**

After January 1, 1971, it shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.

### **§ 1336. Authority of Federal Trade Commission**

#### **(a) Action prior to and after July 1, 1971**

The Federal Trade Commission shall not take any action before July 1, 1971, with respect to its pending trade regulation rule proceeding relating to cigarette advertising. If at any time on or after July 1, 1971, the Federal Trade Commission determines it is necessary to take action with respect to such pending trade regulation rule proceeding, it shall notify the Congress of the determination. Such notification shall include the text of the trade regulation rule and a full statement of the basis for such determination. No trade regulation rule adopted in such proceeding may take effect until six months after the Commission has notified the Congress of the text of such rule, in order that the Congress may act if it so desires.

#### **(b) Unfair or deceptive acts or practices**

Except as provided in subsection (a) of this sections, nothing in this chapter shall be construed to limit, restrict, expand, or otherwise affect the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes.

#### **(c) Issuance of trade regulation rules or requirements for affirmative statements in advertising**

Nothing in this chapter shall be construed to affirm or deny the Federal Trade Commission's holding that it has the authority to issue the trade regulation rules or to require an affirmative statement in any cigarette advertisement.

### **§ 1337. Reports to Congress**

#### **(a) Secretary of Health and Human Services**

The Secretary of Health and Human Services shall transmit a report to the Congress not later than January 1, 1971, and annually thereafter, concerning (A) current

information in the health consequences of smoking, and (B) such recommendations for legislation as he may deem appropriate.

#### **(b) Federal Trade Commission**

The Federal Trade Commission shall transmit a report to the Congress not later than January 1, 1971, and annually thereafter, concerning (A) the effectiveness of cigarette labeling, (B) current practices and methods of cigarette advertising and promotion, and (C) such recommendations for legislation as it may deem appropriate.

### **§ 1338. Criminal penalty**

Any person who violates the provisions of this chapter shall be guilty of a misdemeanor and shall on conviction thereof be subject to a fine of not more than \$10,000.

### **§ 1339. Injunction proceedings**

The several district courts of the United States are invested with jurisdiction, for cause shown, to prevent and restrain violations of this chapter upon the application of the Attorney General of the United States acting through the several United States attorneys in their several districts.

### **§ 1340. Cigarettes for export**

Packages of cigarettes manufactured, imported, or packaged (1) for export from the United States or (2) for delivery to a vessel or aircraft, as supplies, for consumption beyond the jurisdiction of the internal revenue laws of the United States shall be exempt from the requirements of this chapter, but such exemptions shall not apply to cigarettes manufactured, imported, or packaged for sale or distribution to members or units of the Armed Forces of the United States located outside of the United States.



## APPENDIX B

IN THE COURT OF APPEALS, THIRD DISTRICT OF  
TEXAS, AT AUSTIN  
No. 3-89-175-CV

WELDON J. CARLISLE, ET AL.,  
APPELLANTS,  
v.  
PHILIP MORRIS, INC., ET AL.,  
APPELLEES.

FROM THE DISTRICT COURT OF TRAVIS COUNTY,  
98TH JUDICIAL DISTRICT  
NO. 387,233, HONORABLE PETE LOWRY, JUDGE  
PRESIDING

This appeal presents the question of whether the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§1331-1341 (1982 & Supp.1990) ("Labeling Act"), preempts state common-law tort claims for injuries or death allegedly suffered as a result of smoking cigarettes. Plaintiffs below were two individuals alleging injuries and two widows alleging wrongful death.<sup>1</sup> Defendants below were various cigarette manufacturers, wholesalers, and related entities.<sup>2</sup>

<sup>1</sup> Weldon J. Carlisle; Gilmer T. Woods; Phyllis T. Rothgeb, individually and as Administratrix of the Estate of John R. Rothgeb, deceased; and Nadia Leanora Dyer, individually and as Administratrix of the Estate of Gerald Wayne Dyer, deceased. For clarity, these parties, appellants in this Court, will be referred to herein as "plaintiffs."

<sup>2</sup> Philip Morris, Inc.; R. J. Reynolds Tobacco Company; The American Tobacco Company; Liggett & Myers, Inc.; Liggett & Myers Tobacco Company; Liggett Group, Inc.; The Tobacco Institute, Inc.; The Counsel for Tobacco Research—U.S.A., Inc.; and H. E. Butt Grocery Company. For clarity, these parties, appellees in this Court, will be referred to herein as "defendants."

In four separate suits, plaintiffs alleged five causes of action: (1) failure to warn; (2) design defects; (3) manufacturing defects; (4) affirmative misrepresentation; and (5) civil conspiracy. After consolidating the four cases, the trial court granted the defendants' motions for summary judgment on the ground that the Labeling Act preempted all of the plaintiffs' claims. Plaintiffs perfected this appeal. We will reverse the trial court's judgment and remand the cause.

## PLAINTIFFS' CLAIMS

Plaintiff Carlisle smoked for over sixty-five years. He now suffers from laryngeal cancer, which he alleges was caused by prolonged cigarette smoking. Plaintiff Woods, a cigarette smoker for fifty-three years, suffers from lung cancer, which he alleges was caused by prolonged smoking. The deceased spouses of plaintiffs Rothgeb and Dyer smoked cigarettes for forty-four and thirty-eight years, respectively; both died from lung cancer, which those plaintiffs also allege was caused by prolonged cigarette smoking.

Plaintiffs each alleged the same five theories of recovery. First, under the doctrine of strict liability, they alleged a *defective design* cause of action for marketing "a defectively designed product; a product which was unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use." Second, also under the strict liability doctrine, plaintiffs alleged a *manufacturing defect* cause of action for marketing "a defective and unreasonably dangerous product; a product that is dangerous to an extent beyond that which would be contemplated by the ordinary user of the product with the ordinary knowledge common to the community as to the product's characteristics." Third, under both strict liability and negligence, plaintiffs alleged a *failure-to-warn* cause of action for failing "to give adequate warnings of the danger or adequate instruction for safe use" of cigarettes.

Fourth, based on the RESTATEMENT (SECOND) OF TORTS § 402B, plaintiffs alleged a *misrepresentation* cause of action for “affirmatively misrepresenting to the public that cigarette smoking did not involve significant health hazards.” Fifth, plaintiffs alleged a cause of action for *civil conspiracy*, alleging that defendants had engaged in “both negligent and grossly negligent conduct in concert . . . in an effort to nullify the overwhelming medical evidence that cigarette smoking is addictive and causes lung cancer and death.”

Plaintiffs did not contend that defendants violated any provision of the Labeling Act itself.

Defendants filed motions for summary judgment, arguing (1) that the Labeling Act preempted all of plaintiffs’ claims, and (2) that plaintiffs’ claims were not viable as a matter of substantive law. The trial court granted summary judgment for defendants solely on preemption grounds.

### MOTION TO STRIKE

Before discussing the merits of the plaintiffs’ single point of error, we address defendants’ motion to strike a portion of plaintiffs’ brief. Under the subheading “An Overview of the Problem,” the statement-of-facts section of plaintiffs’ brief contains a lengthy dissertation on the dangers of smoking and the evils of the tobacco industry. Citing and quoting from a host of scientific and medical books, pamphlets, and journals—none of which is in the record—plaintiffs’ brief sets forth twelve pages of “facts” interspersed with disparaging comments about the defendants. It is this portion of plaintiffs’ brief that defendants ask this Court to strike.

It is elementary that, with limited exceptions not material here, an appellate court may not consider matters outside the appellate record. *Sabine Offshore Service, Inc. v. City of Port Arthur*, 595 S.W.2d 840 (Tex. 1979); *Perry*

*v. Kroger Stores*, Store No. 119, 741 S.W.2d 533 (Tex. App. 1987, no writ). That record consists of the transcript and, where necessary, a statement of facts. Tex. R. App. P. 50(a). Material outside the record that is improperly included in or attached to a party’s brief may be stricken. *Henslee v. State*, 375 S.W.2d 474 (Tex. Civ. App. 1963, writ ref’d n.r.e.); *Humble Oil & Refining Co. v. State*, 158 S.W.2d 336, 338 (Tex. Civ. App. 1942, writ ref’d).

Scientific and medical publications such as those referred to in plaintiffs’ brief are outside the record unless they have been properly submitted to the trial court and included as part of the evidence. Indeed, in the trial court, statements from “learned treatises” are admissible only in conjunction with testimony by an expert witness, “even when the authority of the publication is otherwise established.” Goode, Wellborn, & Sharlot, *Guide to the Texas Rules of Evidence: Civil and Criminal* 596 (1988); see Tex. R. Civ. Evid. 803(18).

Accordingly, we grant defendants’ motion to strike. Given the present posture of this appeal, we will not require plaintiffs to rebrief<sup>3</sup> however, in making our decision, we have not considered the offending portion of their brief.

For their part, defendants here have been guilty of a similar transgression. Attached as appendices to their briefs are copies of numerous orders, judgments, and other materials from a variety of state and federal trial courts purporting to reflect decisions upholding federal preemption in cigarette cases. As far as we can tell, these decisions are neither published nor scheduled for publication. They do not appear in the transcript as part of the summary judgment evidence. To the extent defendants intend for such rulings to be legal precedent, the Texas Rules of

<sup>3</sup> Future litigants in this Court should take heed, however. We will not hesitate, on motion or *sua sponte*, to require rebriefing for a flagrant rule violation. Tex. R. App. P. 74(p).



Appellate Procedure expressly prohibit the citation of unpublished opinions. Tex. R. App. P. 90(i). To the extent they are cited merely to show existence of such decisions, they constitute facts outside the record. In either event, those portions of defendants' briefs are stricken *sua sponte*.

### THE LABELING ACT

In 1964 the Surgeon General of the United States issued a widely publicized report implicating cigarette smoking as a cause of lung cancer and other diseases. In 1965 Congress responded to that report and the growing awareness of the health hazard posed by cigarettes by passing the Labeling Act. The most salient feature of the Act was a requirement that warning labels be placed on all cigarette packages and advertisements.<sup>4</sup>

Substantially amended in 1970 and again by the Comprehensive Smoking Education Act of 1984, the Labeling Act contains a declaration of policy, which states that:

<sup>4</sup> The original warning was "Caution: Cigarette Smoking May Be Hazardous to Your Health." Pub.L. No. 89-92, § 4, 79 Stat. 283 (1965). In 1970 that warning was strengthened to read "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." Pub.L. No. 91-222, § 2, 84 Stat. 88 (1970). In 1984, Congress again revised the warning to require, on a basis, the following:

SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.

SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.

SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight.

SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

15 U.S.C. § 1333.

It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

(1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331.

The Act also contains a preemption provision, which reads as follows:

(a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334. Other significant sections of the Labeling Act prohibit cigarette advertising on radio and television (§ 1335), require manufacturers to provide annually a list of ingredients added to tobacco in the manufacturing process (§ 1335a), require the Secretary of Health and Human



Services and the Federal Trade commission to report to Congress annually concerning various cigarette-related issues (§ 1337), require the Secretary of Health and Human Services to carry out a public information program about the dangers of cigarette smoking (§ 1341), and provide for criminal penalties for violations of the Act (§ 1338).

### PRIOR COURT DECISIONS

Ten reported appellate court opinions, five federal and five state, have previously addressed the preemptive effect of the Labeling Act on common-law tort claims for injury from smoking cigarettes. We will briefly summarize the history and holdings of each of those cases, in chronological order.

1. *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3rd Cir. 1986) (Cipollone I), *rev'g* 593 F.Supp. 1146 (D.N.J. 1984), *cert. denied*, 479 U.S. 1043 (1987), *on remand*, 649 F.Supp. 664 (D.N.J. 1986), and 683 F.Supp. 1487 (D.N.J. 1988), *aff'd in part*, 893 F.2d 541 (3rd Cir. 1990) (Cipollone II).

In *Cipollone*, the plaintiff sued under strict liability, negligence, intentional tort, and breach of warranty. In a lengthy opinion, the district court denied the defendants' motion for judgment on the pleadings, holding that none of the plaintiffs' claims were preempted by the Labeling Act. 593 F.Supp. 1146. The Court of Appeals for the Third Circuit reversed, concluding that, although the Act neither expressly preempted such claims nor "occupied the field" relating to cigarettes and health, nonetheless such claims "actually conflicted" with the purposes and objectives of the Act. The court held that the Act preempts "those state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes." 789 F.2d at 187. The appellate court remanded the cause to the

district court for determination of which claims were preempted by the Act. On remand, the district court concluded that the plaintiffs' failure-to-warn, fraudulent-misrepresentation, express-warranty, and conspiracy-to-defraud claims were preempted to the extent that they sought to challenge the defendants' advertising, promotional, and public relations activities. 649 F.Supp. at 668-75. On further appeal after trial, the court of appeals affirmed the district court's preemption ruling, although other aspects of the district court's judgment were reversed and the cause remanded for new trial. 893 F.2d at 581-83.

2. *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987).

In *Stephen*, the widow of a deceased smoker sued, at least in part, on a failure-to-warn theory. The defendant answered that some of the plaintiff's claims were preempted by the Labeling Act. The plaintiff moved to strike that defense. The district court denied the motion, relying on *Cipollone I*. On appeal, the Court of Appeals for the Eleventh Circuit affirmed without significant discussion, adopting the "decision and reasoning" of the Third Circuit in *Cipollone I*.

3. *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1981), *rev'g* 633 F.Supp. 1171 (D.Mass. 1986).

In *Palmer*, the widow of a smoker sued primarily under a failure-to-warn theory, although the complaint also included allegations of "negligence in not making cigarettes safer" as well as breach of implied warranties of merchantability and fitness. The defendants filed a motion to dismiss all claims based on failure to warn. The district court denied the motion. The court expressly disagreed with the Third Circuit's opinion in *Cipollone I*, choosing instead to follow the opinion of Judge Sarokin, the *Cipollone* trial judge. 633 F.Supp. at 1173. On appeal, the Court of Appeals for the First Circuit reversed on "actual

conflict" grounds, holding that permitting such common-law failure-to-warn claims would "disrupt[ ] excessively" the "carefully wrought balance of national interests" struck by Congress in passing the Labeling Act. 825 F.2d at 626.

**4. *Phillips v. R.J. Reynolds Industries, Inc.*, 769 S.W.2d 488 (Tenn. Ct. App. 1988).**

In *Phillips*, it appears that a smoker who contracted Buerger's disease sued solely on a theory of failure to warn. The trial court granted summary judgment for the cigarette companies on the basis of preemption. Relying primarily on *Palmer*, the Tennessee Court of Appeals affirmed. 769 S.W.2d at 490.

**5. *Roydon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230 (6th Cir. 1988), *aff'g* 623 F.Supp. 1189 (D.C. Tenn. 1985).**

In *Roydon*, a ion of the complaint resting on inadequate warnings, on the basis that such claims were preempted by the Labeling Act. 623 F.Supp. at 1190-91. The plaintiffs' "unreasonably dangerous" claim was tried to a jury, following which the court directed a verdict for defendant on substantive-law grounds. 623 F.Supp. at 1191-92. The Court of Appeals for the Sixth Circuit affirmed, relying on *Cipollone I* and *Palmer*.

**6. *Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655 (Minn. 1989), *rev'g in part* 423 N.W.2d 691 (Minn. Ct. App. 1988).**

In *Forster*, a smoker with inoperable lung cancer and his wife brought suit in Minnesota state court under theories of strict products liability, breach of warranty, and negligence. The trial court, relying on *Cipollone I*, granted summary judgment for the defendants on preemption grounds. The Minnesota court of appeals, rejecting the *Cipollone I* appeals court decision and relying instead on the *Cipollone* district court opinion, reversed the summary judgment as to all causes of action. 423 N.W.2d at 692-

93. On further appeal, the Minnesota Supreme Court affirmed in part and reversed in part. The court held that "any state claim that questions the adequacy of cigarette advertising or promotion with respect to smoking and health, or which questions the effect of that advertising or promotion on the federal label, is preempted." 437 N.W.2d at 660. On the other hand, the court held that claims not based on a failure to warn (such as strict liability based on a risk-utility theory, affirmative misrepresentation, and breach of warranty) do not conflict with the objectives of the Labeling Act and are therefore not preempted. *Id.* at 661-62.

**7. *Pennington v. Vistron Corp.*, 876 F.2d 414 (5th Cir. 1989).**

In *Pennington*, the widow of a smoker who had died of cancer of the esophagus sued various cigarette manufacturers, claiming that the companies had failed to provide adequate warnings and that cigarettes are unreasonably dangerous per se. The district court granted summary judgment for the manufacturers on all counts. On appeal, the court of appeals held that the failure-to-warn claim was preempted by the Labeling Act, but that the other claim was not. 876 F.2d at 420-23.

**8. *Hite v. R.J. Reynolds Tobacco Co.*, 578 A.2d 417 (Pa. Super. Ct. 1990).**

In *Hite*, the widow of a deceased smoker sued under theories of defective design and failure to warn. On the basis of preemption, the trial court dismissed both grounds as to a manufacturer against which there were no pre-1965 allegations. On appeal, the Pennsylvania Superior Court held that the failure-to-warn claim was preempted, but that the defective-design claim was not. 578 A.2d at 420. Nonetheless, the appeals court affirmed the dismissal of the defective-design claim on substantive law grounds. *Id.* at 420-21.



9. *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239 (N.J. 1990), *rev'g in part* 542 A.2d 919 (N.J. Super. Ct. App. Div. 1988), *aff'g* 523 A.2d 712 (N.J. Super. Ct. Law Div. 1986).

In *Dewey*, the widow of a smoker who had died of lung cancer sued under theories of design defect, failure to warn, and misrepresentation. The defendants filed a motion to dismiss on the ground that all claims were preempted by the Labeling Act. The trial court, believing itself bound by the Third Circuit's ruling in *Cipollone I*, dismissed the claims founded on failure to warn and misrepresentation. 523 A.2d at 716. However, the court held that the plaintiff's design defect claim was not preempted, even under *Cipollone I*, and denied the motion as to that claim. *Id.* at 716-18. On appeal, the appellate division of the superior court held that it was unnecessary to determine whether or not it was bound by the holding in *Cipollone I*, because it had concluded, on independent review, that the trial court's judgment was correct and should be affirmed. 542 A.2d at 920. On further appeal, the New Jersey Supreme Court reversed the preemption-based dismissal, holding that (1) it was not bound by *Cipollone I*, and (2) the Labeling Act did not preempt any of the plaintiff's claims, including that founded on failure to warn. 577 A.2d at 1243-44.

10. *Rogers v. R.J. Reynolds Tobacco Co.*, 557 N.E.2d 1045 (Ind. Ct. App. 1990).

In *Rogers*, the widow of a deceased cigarette smoker sued under three theories: (1) failure to warn, (2) design defect, and (3) fraud, constructive fraud, and fraudulent concealment. The trial court granted summary judgment in favor of defendants, apparently without specifying a basis. Relying on *Cipollone I*, the Indiana Court of Appeals held that the plaintiff's post-1965 failure-to-warn and fraud claims were preempted. 557 N.E.2d at 1050-51, 1055. The

court held, however, that the design-defect claim was not preempted. *Id.* at 1051.

#### CONCLUSIVENESS OF LOWER FEDERAL COURT DECISIONS

As discussed above, the five federal courts of appeals that have written on the preemptive effect of the Labeling Act are unanimous in their conclusion that common-law failure-to-warn claims, at least, are preempted. See *Pennington*, 876 F.2d 414; *Roysdon*, 849 F.2d 230; *Palmer*, 825 F.2d 620; *Stephen*, 825 F.2d 312; *Cipollone*, 789 F.2d 181. This raises the threshold issue of whether this Court is bound by decisions of lower federal courts on questions of interpretation of federal statutes. We conclude we are not.

This Court has held that "[w]hile a decision of a federal court, other than the Supreme Court, may be persuasive in a state court on a federal matter, it is, nevertheless, not binding, since the state court owes obedience to only one federal court, namely, the Supreme Court." *Barstow v. State*, 742 S.W.2d 495, 501 n.2 (Tex. App. 1987, writ denied) (quoting from Moore & Oglebay, *The Supreme Court, Stare Decisis and Law of the Case*, 21 Tex. L. Rev. 514, 525 (1943)); accord *Turner v. PV Int'l Co.*, 765 S.W.2d 455, 470 (Tex. App. 1988), writ denied per curiam, 778 S.W.2d 865 (Tex. 1989); *Omniphone, Inc. v. Southwestern Bell Tel. Co.*, 742 S.W.2d 523, 526 (Tex. App. 1987, no writ); *Woodward v. Texas Dept. of Human Resources*, 573 S.W.2d 596, 598 (Tex. Civ. App. 1978, writ ref'd n.r.e.); cf. *Summertree Venture III v. FSLIC*, 742 S.W.2d 446, 449-50 (Tex. App. 1987, writ denied).

The rationale for this view is well summarized in the following passage:

[T]he state courts, when adjudicating federal questions, form an integral part of the national judicial hierarchy and apply their own law, not



that of another sovereign. In that capacity they occupy exactly the same position as the lower federal courts, which are coordinate, and not superior to them. There is no appeal from the state to the lower federal courts. Instead both are subject to the reviewing power of the Supreme Court, which furnishes the unifying principle. Decisions of a lower federal court are no more binding on a state court than they are on a federal court not beneath it in the judicial hierarchy.

Note, *Authority in State Courts of Lower Federal Court Decisions on National Law*, 48 Colum. L. Rev. 943, 946-47 (1948) (footnotes omitted). These sound principles seem to represent the majority view among the states. See Annotation, *Duty of state courts to follow decisions of Federal courts, other than the Supreme Court, on Federal questions*, 147 A.L.R. 857 (1943).

In *Olson v. Holmes*, 571 S.W.2d 211 (Tex. Civ. App. 1978), writ ref'd n.r.e. per curiam, 587 S.W.2d 678 (Tex. 1979), this Court, faced with conflicting constructions of a federal statute by a state court of appeals and a federal court of appeals, opted to follow the federal court. This Court's opinion stated that, because we were dealing with rights conferred by federal statute and regulation, "our determination of the appeal should be governed by the federal courts' construction of the statute and regulation." 571 S.W.2d at 213. In so stating, we did not intend to hold that this Court was absolutely bound by the decisions of lower federal courts, but only to acknowledge that such decisions are entitled to due weight and consideration. Therefore, we accord a like meaning to the Texas Supreme Court's per curiam opinion in *Olson*, in which it echoed and approved this Court's "should-be-governed-by" language. 587 S.W.2d at 679.

Accordingly, we conclude that, although they have persuasive value, lower federal court opinions interpreting the Labeling Act are not conclusive in this appeal.

## GENERAL PREEMPTION PRINCIPLES

The supremacy clause of the United States Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. The question whether, pursuant to the supremacy clause, a particular federal law preempts state action is "largely a matter of statutory construction." L. Tribe, *American Constitutional Law* 480 (2d ed. 1988). An examination of congressional intent is required. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1988).

The following passage summarizes the general principles of preemption:

Federal law may supersede state law in several different ways. First, when acting within constitutional limits, congress is empowered to pre-empt state law by so stating in express terms. E.g., *Jones v. Rath Packing Co.* 430 US 519, 525, 51 L Ed 2d 604, 97 S Ct 1305 (1977). Second, congressional intent to pre-empt state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation. *Rice v. Santa Fe Elevator Corp.* 331 US 218, 230, 91 L Ed 1447, 67 S Ct 1146 (1947). . . .

As a third alternative, in those areas where Congress has not completely displaced state regulation, federal law may nonetheless pre-empt state law to the extent it actually conflicts with federal law. Such a conflict occurs either because "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avo-*

cado Growers, Inc. v. Paul, 373 US 132, 142143, 10 L Ed 2d 248, 83 S Ct 1210 (1963), or because the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 US 52, 67, 85 L Ed 581, 61 S Ct 399 (1941).

*California Federal Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 28081 (1987). The starting point in any preemption analysis is "the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

No court has held that the Labeling Act expressly preempts common-law tort claims by persons injured from smoking cigarettes; nor has any court held that the Labeling Act so comprehensively "occupies the field" as to preempt common-law claims on that basis; nor has any court held that it would be impossible to comply with both the Labeling Act and any adverse judgments that might grow out of common-law tort claims. We likewise decline to find common-law claims preempted on any of those bases. Accordingly, the issue this court must decide is whether the availability of state common-law tort remedies to persons injured by smoking cigarettes impedes the accomplishment and execution of the purposes and objectives of the Labeling Act to such a degree that we should infer a congressional intent to eliminate such remedies.

#### PREEMPTION OF DAMAGE AWARDS

More than thirty years ago the Supreme Court, in deciding whether a claim for damages was preempted, stated that

[o]ur concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of pre-

ventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

*San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959). Although *Garmon* concerned the primary jurisdiction of the National Labor Relations Board and *Garmon's* claim was founded on a statutory—rather than common-law—cause of action, the case firmly established the principle that damage awards can have a regulatory effect and, where appropriate, damage claims will be subject to preemption.

In the course of balancing state and federal interests to protect the primary jurisdiction of the NLRB, the Supreme Court has recognized numerous exceptions to strict application of the *Garmon* preemption doctrine, most notably where the state activity in question touches interests that are "deeply rooted in local feeling and responsibility." *Garmon*, 359 U.S. at 244; cf. *Brown v. Hotel and Restaurant Employees*, 468 U.S. 491, 502-03 (1984). The Court has said that "inflexible application of the [*Garmon*] doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 302 (1977). Such holdings are instructive in the present case, though our factual setting is distinct.

#### THE PRESUMPTION AGAINST PREEMPTION

As stated previously, the Supreme Court recognizes a basic presumption against preemption. *Maryland v. Lou-*



isiana, 451 U.S. at 746. In matters traditionally regulated by states and localities, however, that presumption is even stronger: "[When Congress legislates] in a field which the States have traditionally occupied . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest purpose* of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added). Stated differently, "we are not to conclude that Congress legislated the ouster of [a state statute] . . . in the absence of an *unambiguous congressional mandate* to that effect." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47 (1963) (emphasis added). As Professor Tribe has stated,

As a corollary of the rule that state action will not lightly be found to be inconsistent with federal policy, not only are broad and abstract federal goals given scant preemptive effect, but even congressional goals that are tightly-stated will be interpreted narrowly when testing traditional forms of state action for conflict with those goals.

L. Tribe, *supra* at 489.

The Labeling Act touches directly on matters of public health and safety. Therefore, the Act regulates in an area of traditional state control. See *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985) ("[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern.").

Nonetheless, one of the defendants urges us to adopt the view of the Eleventh Circuit expressed in *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), cert. denied, \_\_\_ U.S. \_\_\_, 110 S.Ct. 1781 (1990):

[I]n contrast to the strong presumption against preemption that we apply in determining whether the language of a federal statute or regulation

expressly preempts state law, no such presumption is applicable in deciding whether state law conflicts with federal law, even where the subject of the state law is a matter traditionally regarded as properly within the scope of the states' rights. See *Felder v. Casey*, \_\_\_ U.S. \_\_\_, \_\_\_, 108 S.Ct. 2302, 2306, 101 L.Ed.2d 123 (1988). . . .

875 F.2d at 826.

We think *Taylor* paints with too broad a brush. First, the case cited as support for the proposition, *Felder v. Casey*, 487 U.S. 131 (1988), in fact provides no support. The Court in *Felder* did not hold, or even imply, that no presumption against preemption existed in conflict-preemption cases. The Wisconsin Supreme Court had ordered dismissal of a plaintiff's civil rights action, brought under 42 U.S.C. § 1983 (1981), for failure to comply with Wisconsin's 120-day notice-of-claim statute. 408 N.W.2d 19. The Wisconsin court reasoned, in part, that the notice requirement advanced "the State's legitimate interests in protecting against stale or fraudulent claims, facilitating prompt settlement of valid claims, and identifying and correcting inappropriate conduct by governmental employees and officials." 487 U.S. at 137. In responding to this argument, the United States Supreme Court merely quoted the following rule:

Under the Supremacy Clause of the Federal Constitution, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law," for "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Free v. Bland*, 369 US 663, 666, 8 L.Ed.2d 180, 82 S.Ct. 1089 (1962).

487 U.S. at 138. Like *Felder*, *Free v. Bland*, 369 U.S. 663 (1962), was a case in which actions authorized by federal law directly conflicted with state law. In *Free*, federal law



authorized survivorship provisions in United States Savings Bonds. Texas community property law, however, had been held to disallow any agreement to a survivorship provision with regard to community property. *See Hilley v. Hilley*, 342 S.W.2d 565 (Tex.1961). A more direct conflict can hardly be imagined.

We agree wholeheartedly that, as a practical matter, where a right expressly granted by federal law is conditioned or limited by state law, or an action expressly authorized by federal law violates state law, the "relative importance to the State of its own law is not material." Logic and the supremacy clause dictate this result. No all conflict-preemption cases involve such direct and unmistakable conflicts, however. Indeed, the Supreme Court has recognized a distinction between, on the one hand, "impossibility" cases such as *Florida Avocado Growers* and "outright or actual conflict" cases such as *Free* and, on the other hand, "obstacle" or "frustration" cases such as *Hines v. Davidowitz*, 312 U.S. 52 (1941). *See Louisiana Public Service Comm. v. FCC*, 476 U.S. 355, 368-69 (1986). The latter category of cases can present very difficult statutory-construction and policy questions. The congressional objective may be difficult to ascertain. Or, the congressional enactment may have multiple objectives, some more important than others. The effect of state law on congressional objectives may be quite mild. or, the overall effect of state law may be difficult to predict, particularly in the instance of multiple congressional goals. It is in such close and difficult cases that a presumption against preemption seems to us most appropriate:

By declining to infer preemption in the face of congressional ambiguity, the Court is not interposing a judicial barrier to Congress's will in order to protect state sovereignty—an interposition that would violate *Garcia* [*v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)]—but is instead furthering the spirit of

*Garcia* by requiring that decisions restricting state sovereignty be made in a deliberate manner by Congress, through the explicit exercise of its lawmaking power to that end.

L. Tribe, *supra* at 480.

In addition, the Supreme Court itself obviously does not follow the *Taylor* court's interpretation of *Felder*. In *California v. ARC America Corp.*, 490 U.S. —, 104 L.Ed.2d 86 (1989), a case decided *after Felder*, the Court expressly recognized that "[a]ppellees' only contention [in this case] is that state laws permitting indirect purchaser recoveries pose an obstacle to the accomplishment of the purposes and objectives of Congress." 104 L.Ed.2d at 95. Nonetheless, the Court held that:

In this case, in addition, appellees must overcome the presumption against finding pre-emption "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.* 331 US 218, 230, 91 L.Ed. 1447, 67 Sct 1146 (1947).

*Id.* at 94.

We conclude, therefore, that the present case requires application of the "heightened" presumption against preemption described in the foregoing cases.

#### DISCUSSION: PREEMPTION BY THE LABELING ACT IN THE PRESENT CASE

We have identified six factors that lead us to conclude that the Labeling Act does not reflect a clear, manifest, and unambiguous congressional intent to preempt the common-law tort claims alleged by the plaintiffs in the present case: (1) The "frustrating" effect of such claims on congressional goals is speculative; (2) Avoiding diverse la-

beling regulations is the *secondary* goal of the Act; the *primary* goal—informing the public of the hazards of cigarette smoking—would arguably be enhanced by permitting common-law tort claims; (3) A holding that the plaintiffs' claims are preempted would leave them without any remedy for the defendants' allegedly tortious conduct; (4) Congress could easily have expressly preempted common-law tort claims, but did not do so; (5) The legislative history of the Labeling Act gives no indication that Congress intended to preempt common-law tort claims; and (6) The Comprehensive Smokeless Tobacco Health Education Act of 1986 evinces congressional intent that common-law tort claims not be preempted.

We note initially that the defendants' strongest case for preemption lies with failure-to-warn claims. Indeed, *Pennington*, *Forster*, and *Hite*, while concluding that failure-to-warn claims are preempted, determined that claims based on other legal theories are not. Accordingly, in the following discussion we will, where appropriate, focus our analysis on failure-to-warn claims, with the understanding that we consider claims based on other theories to be even stronger against preemption.

### 1. Speculative conflict

The "obstacle" standard for determining whether state law "actually conflicts" with federal law was enunciated in *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941):

In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether under the circumstances of this particular case, [the state] law stands as an obstacle to the accomplishment and

execution of the full purposes and objectives of Congress.<sup>20</sup>

<sup>20</sup> 20 Cf. *Savage v. Jones*, 225 US 501, 533, 56 L. ed 1182, 1195, 32 S. Ct 715: "... If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power."

Defendants argue that permitting claims such as those alleged by the plaintiffs will frustrate the "uniformity" goal stated in section 1331 of the Labeling Act:

[That] commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy [of informing the public of the health hazards of cigarette smoking] and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331. We disagree. By awarding damages, courts do not *compel* any behavior, other than requiring a particular defendant to pay compensation to a particular plaintiff:

A damages award . . . requires only payment—it is not an injunction requiring the defendant to incorporate into its advertising a fixed legend different from the federally required label. The labeling acts do not prohibit a manufacturer from warning of undisclosed health risks. The only prohibition is against a state agency passing a law requiring cigarette companies to use a different label.

Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. Cal. L. Rev. 1423, 1454 (1980).



We are mindful that a damages award may motivate a defendant to change his future behavior voluntarily, but what the nature of that change will be is purely speculative. A cigarette manufacturer that was required to pay a damages award because it had failed to adequately warn of the hazards of smoking cigarettes would have several options. For example, the manufacturer could choose to increase the safety of its product. Or, it could choose simply to absorb the expense of any damage awards, either by raising prices or by decreasing its profit margin. As Justice Blackmun stated in his dissent in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984),

When a victim is determined to be eligible for a compensatory award, that award is calculated by reference to the victim's injury. Whatever compensation standard a State imposes, whether it be negligence or strict liability, a [nuclear] licensee remains free to continue operating under federal standards and to pay for the injury that results.

464 U.S. at 264 (Blackmun, J., dissenting). Or, the manufacturer could include additional health information in cigarette packages without changing the package and advertisement warnings. Finally, the manufacturer could, of course, choose to increase the strength of its warning. As noted by the district court in *Cipollone I*, which course the producer of a defective product takes "depends upon a complex combination of economics, morality and psychology." 593 F.Supp. at 1156.

In light of the manufacturers' options and the variables that influence their choices, it is simply not clear that common-law damage awards against cigarette manufacturers would result in the "diverse, nonuniform, and confusing cigarette labeling and advertising regulations" Congress sought to avoid through the Labeling Act. We conclude, therefore, that the potential conflict asserted by

defendants is too speculative to warrant preemption. See *English v. General Elec. Co.*, \_\_\_ U.S. \_\_\_, 110 L.Ed.2d 65, 81 (1990) ("[P]reemption is ordinarily not to be implied absent an 'actual conflict.'"); *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) ("The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute."); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 446 (1960) ("[T]his Court's decisions . . . enjoin seeking out conflicts between state and federal regulation where none clearly exists.").

## 2. Secondary goal

The Third Circuit in *Cipollone* stated that the Labeling Act represented "a carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of national economy." 789 F.2d at 187. The First Circuit in *Palmer* stated that, although the Act had two "policies," it had "only one purpose: to strike a fair, effective balance between these two competing interests." 825 F.2d at 626. Our reading of the Act and its legislative history reveals no such delicate balance.

The primary purpose of the Act is to inform the public of the hazards of cigarette smoking. The legislative history of the Act indicates plainly that "[t]he principal purpose of the bill is to provide adequate warning to the public of the potential hazards of cigarette smoking . . ." 1965 U.S.Code Cong. & Admin. News 2350.<sup>5</sup> The policy of pro-

<sup>5</sup> See also the letter, dated April 7, 1965, from Robert E. Giles, General Counsel of the Department of Commerce, to Congressman Oren Harris, Chairman of the House Committee on Interstate and Foreign Commerce:

One basic objective of each of these bills is the same—to protect the health of consumers and prospective consumers of cigarettes. H.R. 3014 and H.R. 4007 have the additional



protecting commerce and the economy is secondary, being protected only to the extent "consistent with this declared policy," i.e., the policy of informing the public.

Instead of treating "these two competing interests" equally, Congress subordinated the economic interests of the tobacco industry and the national economy to the more pressing interests of public health and information. Thus, state tort actions cannot disrupt excessively a carefully drawn balance of purpose that is, in fact, no balance at all.

Comment, *Inadequate Warning Claims Preempted by Cigarette Labeling Act: Palmer v. Liggett Group, Inc.*, 34 Loy. L. Rev. 419, 430 (1988).

Moreover, holding common-law claims preempted would remove the motivation for cigarette manufacturers to voluntarily include additional health information and/or warnings in or on cigarette packages and advertisements. That sort of disincentive would actually hinder the Act's primary purpose of achieving wide dissemination of such information. We find it difficult to believe that Congress would have built such a contradiction into the Act. In response to a similar contention, the Court of Appeals for the District of Columbia Circuit stated:

[I]f we are to adopt [the cigarette manufacturers'] analysis, we must conclude that Congress legislated to curtail the potential flow of information lest the public learn too much about the hazards

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stated objective of protecting commerce and the national economy. While we would ordinarily strongly support both objectives, we feel that . . . the proposed means of attaining the latter objective may be incompatible with the health protection objective. Under such circumstances we believe that the public health interest must prevail.

1965 U.S.Code Cong. & Admin. News 2350, 2361.

of smoking for the good of the tobacco industry and the economy. We are loathe [sic] to impute such a purpose to Congress absent a clear expression.

*Banzhaf v. FCC*, 405 F.2d 1082, 1089 (D.C. Cir.1968), cert. denied, 396 U.S. 842 (1969).

### 3. No Remedy.

The Labeling Act provides no federal remedies, administrative or otherwise, for persons who claim to have been harmed as a result of cigarette manufacturers' tortious conduct. Thus, preemption in the present case would leave the plaintiffs without a remedy.

The United States Supreme Court has generally been unwilling to permit such a result. For example, in *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 (1954), a labor case, the Court used the following words to distinguish an earlier ruling:

In [*Garner v. Teamsters C. & H. Local Union*, 346 U.S. 485 (1953)], Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injunctive procedure conflicted. Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct. We see no substantial reason for reaching such a result.

347 U.S. at 663-64 (footnote omitted). The plaintiff in *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966), an-

other labor case, sought damages for malicious libel. In concluding that state common-law remedies were not preempted, the Court stressed that the "inability [of the National Labor Relations Board] to provide redress to the maligned party[ ] vitiates the ordinary arguments for pre-emption." *Id.* at 64; *see also Farmer*, 430 U.S. at 298. Thus, even in the area of labor law, where the interests of the federal government have long been recognized as preeminent, the Supreme Court has been reluctant to preempt state common-law tort claims.

The Supreme Court has taken a similar view outside the labor law context. In *Silkwood*, the Court held that a state common-law tort claim was not preempted by the Atomic Energy Act, notwithstanding that less than a year earlier, in *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983), the Court had held that, with narrow exceptions, the federal government had "occupied the entire field of nuclear safety concerns." 461 U.S. at 212-13. Justice White, writing for the *Silkwood* majority, stated that the failure of Congress to expressly preempt state-law remedies

takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct. *It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.* See *Construction Workers v. Laburnum Corp.*, 347 US 656, 663-664, 98 L.Ed. 1025, 74 S.Ct. 833 (1954).

464 U.S. at 251 (emphasis added) In dissent, Justice Blackmun echoed this dim view of leaving injured persons without a remedy:

Because the Federal Government does not regulate the compensation of victims, and because *it is inconceivable that Congress intended to leave victims with no remedy at all,*<sup>7</sup> the pre-emption

analysis established by *Pacific Gas* comfortably accommodates—indeed it compels—the conclusion that compensatory damages are not pre-empted whereas punitive damages are.

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<sup>7</sup> . . . The absence of federal regulation governing the compensation of victims of nuclear accidents is strong evidence that Congress intended the matter to be left to the States.

464 U.S. at 263-64 (Blackmun, J., dissenting) (emphasis added).

In the context of this discussion, the distinction between common-law remedies and statutory remedies may also be significant. Common-law tort remedies reflect a recognition, often of many centuries' duration, that a person injured by wrongful conduct is entitled to some sort of remedy against the tortfeasor to compensate for his injuries. They reflect a conclusion that society ought, for the good of the whole, to formally sanction and assist in enforcing such remedies. To take from an injured person all such remedies, without any replacement, threatens the very foundation of our legal system: "[T]he refusal to redress an otherwise actionable wrong creates disrespect for the law and encourages the victim to take matters into his own hands." *Linn*, 383 U.S. at 64 n.6. To infer that Congress set out to eliminate such remedies without even commenting on their elimination would be even more perilous.

Statutory remedies, on the other hand, while representing the conclusion of a legislature that certain conduct should be compensable, do not carry the sanction of ancient societal expectations. Indeed, legislatures have been known to create relatively fleeting rights: here today, gone tomorrow. Moreover, in the context of state and federal relations, it is significant that the purpose of a legislatively created cause of action is more likely to be regulation of conduct than compensation of victims. Although the pur-



pose of a state law is not a major factor to be considered in deciding preemption questions, *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971), it cannot be ignored, *Pacific Gas & Electric*, 461 U.S. at 216.

At least one federal court of appeals has held that a full-blown balancing of state and federal interests, presumably similar to that required before *Garmon*-preemption may be applied, is appropriate in the present analysis:

A decision about preemption on that ground [i.e., frustration of federal purpose] requires the court independently to consider national interests and their putative conflict with state interests. While preemption under a theory of express or implied preemption is essentially a matter of statutory construction, preemption under a frustration of federal purpose theory is more an exercise of policy choices by a court than strict statutory construction.

*Abbot v. American Cyanamid Co.*, 844 F.2d 1108, 1113 (4th Cir.1988). While we express no disagreement with this conclusion, the present case does not demand a determination of the issue. A holding of preemption would leave plaintiffs, allegedly injured by the tortious conduct of defendants, without a remedy. If, by our inquiry into the Labeling Act, we are truly seeking congressional intent, we cannot ignore a consequence of such import.

#### 4. Congressional silence

Smokers who have developed lung cancer and other diseases have been suing cigarette manufacturers under state tort law since at least as far back as the 1950's. See Comment, *The Product Liability of the Tobacco Industry: Has Cipollone v. Liggett Group Finally Pierced the Cigarette Manufacturers' Aura of Invincibility?*, 30 B.C.L. Rev. 1103, 1117-26 (1989). The Supreme Court has held, as early as 1959, that damage awards can have a regulatory

effect and that damage suits under state law are subject to being preempted by federal statutes. See *Garmon*, 359 U.S. at 247. The Supreme Court has been stating since at least 1947 that, in areas traditionally regulated by the states, such as health and safety, courts will presume that preemption of state law was not intended unless the contrary is shown to be the "clear and manifest purpose of Congress." *Rice*, 331 U.S. at 230. We must presume that Congress was aware of such lawsuits and judicial decisions when it passed and later amended the Labeling Act.

Yet, when Congress decided to include an express preemption provision in the Labeling Act, it made no mention of preempting damage suits or awards. All courts, including the five federal courts of appeals cited above, agree that the Labeling Act does not expressly preempt common-law claims. Given the "drastic clarity" with which Congress can speak when it so desires, and considering that in section 1334 of the Act it spoke with some clarity about other areas of preemption, its failure to speak on the subject of common-law claims is significant. Even in *Hines*, the Supreme Court recognized that "where the Congress, while regulating related matters, has purposely left untouched a distinctive part of a subject which is peculiarly adapted to local regulation, the state may legislate concerning such local matters which Congress could have covered but did not." 312 U.S. at 68 n.22. Although there may be "manifest dangers in trying to discern the tune when listening to the sounds of Congressional silence . . . the benefit of the doubt in our Federal system is tilted against Federal pre-emption of state law: the symphonic tie normally goes to the plaintiffs." L. Tribe, *Federalism With Smoke and Mirrors*, *The Nation* 788, 788-89 (June 7, 1986).

#### 5. Legislative history

Although reliance on legislative history to discern congressional intent is "a step to be taken cautiously,"



*Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 26 (1977), the legislative history of the Labeling Act is significant for our purposes in at least three respects. First, in virtually every congressional discussion, statements about preemption are couched in terms of "laws" or "regulations" in the sense of legislative enactments, rather than "regulation" in a broader sense. During the 1965 debates, for example, House Report No. 449 described congressional fear that "a multiplicity of State and local regulations pertaining to labeling of cigarette packages could create chaotic marketing conditions and consumer confusion." 1965 U.S. Code Cong. & Admin. News 2250, 2352. In 1969 the Senate Commerce Commission stated the following in Senate Report No. 91-566:

In some instances, counties or municipalities exercise their authority over advertising by local ordinances, or regulations, or even occasionally by resolution. In order to avoid the chaos created by a multiplicity of conflicting regulations, however, the bill preempts State requirements or prohibitions with respect to the advertising of cigarettes based on smoking and health. This preemption is intended to include not only action by State statute but by all other administrative actions or local ordinances or regulations by any political subdivision of any state.

1970 U.S. Code Cong. & Admin. News 2652, 2663. In addition, individual statements by senators, congressmen, and other interested parties seem to reflect the same focus. See the numerous examples cited by the district court in *Cipollone I*, 593 F.Supp. at 1159-61.

Second, the congressional reports, debates, and discussions touching on the preemption issue contain no mention whatsoever of preempting common-law tort claims. In light of the strong presumption against preemption, such silence is telling. "[T]he conspicuous absence [in congressional de-

bates] of any reference to the preemption of state common law claims . . . evidences Congress' intention to preclude only state and local legislatures from passing conflicting labeling laws." Comment, *Common Law Claims Challenging Adequacy of Cigarette Warnings Preempted Under the Federal Cigarette Labeling and Advertising Act of 1965: Cipollone v. Liggett Group, Inc.*, 60 St. John's L. Rev. 754, 762 n.32 (1986).

Finally, even the discussions that mention common-law claims do so in the context of considering the effect of the Act on a defendant's "assumption of the risk" defense in a tort action:

MR. MACKAY: I would like to ask you this as a lawyer. Would not the presence of the type of warning suggested in these bills greatly strengthen the hand of a defendant in a tort case?

MR. ELLENBOGEN: In the long run it might do so, because those cases that I have read—and I have not made a real study of this particular thing—but the *Green* case, for example, is based, I believe, on the implied warranty of fitness, and there being no notice of the health hazard to the consumer.

*Hearings on H.R. 2248, 3014, 4007, and 4249 Before the House Committee on Interstate and Foreign Commerce*, 89th Cong., 1st Sess. 176 (1965) (statement of Theodore Ellenbogen, Acting Assistant General Counsel of the Department of Health, Education, and Welfare). See also *Cipollone I*, 593 F.Supp. at 1162-63. The very existence of debate over the effect of the Act on substantive defenses is inconsistent with the notion that Congress intended to preempt common-law claims.

#### 6. Smokeless Tobacco Act

Also worthy of note on the issue of congressional intent is the passage in 1986 of the Comprehensive Smokeless

Tobacco Health Education Act, 15 U.S.C. §§ 4401-4408 (Supp.1990) (Smokeless Tobacco Act). The legislative history of that Act indicates that its passage was spurred by the recent resurgence of smokeless tobacco products. Not surprisingly, it was patterned after the Labeling Act: "[The Smokeless Tobacco Act], for the most part, simply extends the provisions of P.L. 98-474, the Comprehensive Smoking Education Act of 1984, to include smokeless tobacco products." 1986 U.S. Code Cong. & Admin. News 7, 11.

Although patterned after the Labelling Act, the Smokeless Tobacco Act contains some significant differences from its source. Chief among these, for our purposes, is the presence in the preemption section of the following provisions: "Nothing in this chapter shall relieve any person from liability at common law or under State statutory law to any other person." 15 U. S. C. § 4406(c).

Although an analysis of the various differences between the two Acts seems to us a highly problematic inquiry, two conclusions can readily be drawn. First, although the Smokeless Tobacco Act does not contain an express statement of purpose, as the Labeling Act does, logic compels the conclusion that their purposes are parallel, if not identical: (1) to inform the public about the dangers of tobacco product use, and (2) to protect commerce as much as possible, consistent with the primary objective of informing the public of health hazards, by preventing diverse labeling regulations. Second, by expressly providing that state common-law claims were not preempted, Congress indicated its belief that such claims would not unduly frustrate its goal of preventing diverse labeling regulations:

The existence of a savings clause in the Smokeless [Tobacco] Act could be helpful to either side of the preemption debate. The more reasonable interpretation of this legislation, however, is that it expresses the ongoing, unchanging, undiminished intent of Congress not to preclude common-

law causes of action for failure to warn against the tobacco industry.

Comment, *Preemption of Recovery in Cigarette Litigation: Can Manufacturer Be Sued for Failure to Warn Even Though They Have Complied with Federal Warning Requirements?*, 20 Loyola L.A.L. Rev. 867, 918-19 (1987).

### FLAWS OF PRIOR CIGARETTE CASES

The cases holding common-law tort claims to be preempted by the Labeling Act have been justifiably criticized. In the leading case, *Cipollone I*, the court of appeals disregarded legislative history, ignored the fact that preemption would leave the plaintiff without a remedy, and gave little weight to the heightened presumption against preemption. 789 F.2d 181. Of that court's treatment of the preemption issue, Professor Tribe has stated:

The Third Circuit [in *Cipollone I*], in reading Congress' preemption language expansively, apparently found that Congress meant to exempt the tobacco industry from the choice, faced by manufacturers in virtually every other industry, among increasing product safety, increasing warnings, or paying damages to injured consumers. That holding seems hard to square with *Silkwood* and with the Supreme Court's admonition that there is an overriding presumption that "Congress did not intend to displace state law."

L. Tribe, *supra* at 490-91 (footnotes omitted). That critical view has generally been echoed by other commentators. See Comment, *supra*, 30 B.C.L. Rev. 1103 (1989); Comment, *supra*, 20 Loy. L.A.L. Rev. 867 (1987); Edell & Walters, *The Doctrine of Implied Preemption in Products Liability Cases—Federalism in the Balance*, 54 Tenn. L. Rev. 603 (1987) (in fairness, we note that the authors of this article have represented plaintiffs in several lawsuits



against cigarette manufacturers); Comment, *supra*, 60 St. John's L. Rev. 754 (1986).

Finally, Judge Gibbons, the Chief Judge of the Third Circuit, wrote in a concurring opinion to *Cipollone II* that

I believe that our interlocutory ruling [in *Cipollone I*] on the preemptive effect of the Labeling Act, to the extent that we reached a definitive ruling, was wrong as a matter of law, and should be overruled by the court in banc. . . . Thus, while I join in Part XII [the preemption section] of the opinion of the court, I do so only because this panel is bound by what I believe to be an erroneous opinion of the Court.

893 F.2d at 583. In light of the number of courts that have followed the preemption holding of *Cipollone I*, Judge Gibbons's comments are tinged with irony.

The decision in *Palmer* is likewise flawed. While Third, Fifth, Sixth, and Eleventh Circuit panels incorrectly ignored the consequence of leaving their respective plaintiffs without any remedy, in *Palmer* the First Circuit brushed aside the plaintiff's "no remedy" argument with two statements that are unsatisfactory, at best. First, the court stated that, unlike the activities in *Silkwood* and *Laburnum*, "cigarette smoking, at least initially, is a voluntary activity." 825 F.2d at 627. Among other vices, this statement—without any support—erroneously discounts the possibility that smoking cigarettes could be shown to be addictive. Current medical research apparently supports the possibility of such an addictive effect.<sup>6</sup> That addictive property, if shown to exist, could transform what was initially a voluntary activity into an involuntary one, ef-

<sup>6</sup> "The Surgeon General now classifies cigarette smoking as physiologically addictive, as do the National Institute of Drug Abuse and the American Psychiatric Association." Comment, *supra*, 30 B.C.L. Rev. at 1128 n.179.

fectively placing a prospective plaintiff in exactly the same position as the plaintiffs in *Silkwood* and *Laburnum*.<sup>7</sup> Indeed, the failure to warn of cigarettes' addictive nature could be the essence of a plaintiff's complaint.<sup>8</sup> In such a case, the fact that the plaintiff's smoking may have been "initially" voluntary would be immaterial. Most importantly, however, the statement in *Palmer* inserts into the preemption decision a consideration that properly goes only to the merits of the case: by dismissing smoking as a "voluntary activity," the First circuit held the plaintiff's claim preempted because, at least in part, he had "assumed the risk." This is improper preemption analysis. The voluntariness of the plaintiff's actions and the impact of that determination on the defendant's liability are issues for resolution on the merits of the case, not as part of the preemption decision.

Next, the *Palmer* court opined that "[t]he Supreme Court has often left parties without a remedy by finding state common law preempted." Cited as authority for this proposition were *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), and *Farmers Union v. WDAY*, 360 U.S. 525 (1959). Neither case supports the stated proposition. In *Kalo Brick*, extensive administrative remedies were available to an aggrieved party. Indeed, the Supreme Court felt compelled to state in its opinion that "[o]ur decision today does not

<sup>7</sup> "[M]edical research has determined that nicotine, which is present in tobacco and cigarette smoke, is an addictive drug that causes the smoker's inability to quit smoking despite his or her awareness of its health risks." Comment, *supra*, 30 B.C.L. Rev. at 1128 n.179.

<sup>8</sup> See Comment, *supra*, 30 B.C.L. Rev. at 1128-31; cf. *Crocker v. Winthrop Laboratories, Div. of Sterling Drug, Inc.*, 514 S.W.2d 429 (Tex. 1974). A 1981 Federal Trade Commission report showed that, while 90% of the American public is aware that cigarettes are hazardous to health, over half of American adults do not know that cigarette smoking is addictive. See Comment, *supra*, 20 Loy. L.A.L. Rev. at 914 (1987).



leave a shipper in respondent's position without a remedy if it is truly harmed." 450 U.S. at 331. In *WDAY*, federal law expressly prohibited the censorship of certain political speeches broadcast over the radio. The Court held that the statute's absolute prohibition gave radio stations immunity from libel claims arising out of such political speeches, i.e., common-law libel claims were preempted. otherwise, the Court noted, the federal statute "would sanction the unconscionable result of permitting civil and perhaps criminal liability to be imposed for the very conduct the statute demands of the licensee." 360 U.S. at 531. We note initially that a person harmed by libelous remarks contained in such a speech would still have a cause of action against the maker of the speech and, therefore, would not be left without a remedy. Moreover, the statute in *WDAY* had the effect of mandating specific conduct, not merely *minimum* conduct.<sup>9</sup> *WDAY* was, therefore, a case in which it was not possible to comply with both the federal statute and state tort law. We agree that it is appropriate in such "impossibility" cases to infer congressional intent to preempt state damage claims of all types. However, the proposition that the Supreme Court has "often left parties without a remedy" by preempting state commonlaw tort claims in frustration-of-purpose cases

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<sup>9</sup> We conclude that the Labeling Act requires only minimum conduct on the part of cigarette manufacturers. The congressional goal appears to have been uniform labeling *regulations*, not uniform labels. Thus, manufacturers are not prevented from voluntarily placing stronger warnings on cigarette packages and advertisements. Cf. *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1543 (D.C. Cir.), cert. denied, 469 U.S. 1062 (1984). *Banzhaf v. Federal Communications Comm'n*, 405 F.2d 1082 (D.C. Cir. 1968). "*Banzhaf* supports the argument that Congress did not seek to preempt the flow of information to the public, but only the affirmative requirement of additional labeling. Nothing short of that is inconsistent, incompatible, or an obstacle to Congress' purpose in legislating the Act." Comment, *supra*, 20 Loy. L.A.L. Rev. at 908.

is both incorrect and contrary to a healthy balance of state and federal sovereignty:

[T]he [Supreme] Court is not in the practice of denying aggrieved parties any avenue of relief; it simply finds it acceptable to deprive them of one avenue when another is available. The *Palmer* court, on the other hand, has denied the plaintiffs their only avenue of relief, in contravention of the language in *Silkwood* and other cases. Instead of reaching to find preemption, courts who are about to deny plaintiffs their only avenue for compensation in an area traditionally controlled by state law should carefully scrutinize federal law to find unambiguous congressional intent to usurp the province of the state.

Comment, *supra*, 34 Loy. L. Rev. at 431.

#### PREEMPTION CONCLUSION

We agree with the Minnesota Court of Appeals in *Fors-ter* that "if there is a need to immunize the tobacco industry from tort liability, that decision must be made by Congress in an unambiguous mandate and not by the courts." 423 N.W.2d at 701 (emphasis in original). We agree with the district court in *Cipollone I* that "Congress intended that . . . whatever tension exists between federal regulation of cigarette labeling and advertising and state common law claims be tolerated." 593 F.Supp. at 1168. And we agree with the Supreme Court of New Jersey in *Dewey* that "had Congress intended to immunize cigarette manufacturers from packaging, labeling, misrepresentation, and warning claims, it knew how to do so with unmistakable specificity." 577 A.2d at 1251.

We do not find in the Labeling Act and its legislative history, either expressly or by necessary implication resulting from conflict with state law, the clear, manifest, and unambiguous expression of congressional intent needed

to require preemption of the common-law tort claims alleged here. The trial court's summary judgment was improper.

#### MERITS OF PLAINTIFF'S CLAIMS

One of the defendants, R.J. Reynolds Tobacco Company, urges that, in the event this Court concludes that one or more of the plaintiffs' causes of action are not preempted, we should nonetheless affirm the trial court's judgment on the ground that the pleadings and summary judgment evidence show conclusively that none of the plaintiffs' claims is viable under substantive Texas law. We decline to address this question, however, for the reasons stated below.

In the trial court, defendants moved for summary judgment on two alternative grounds: (1) preemption, and (2) substantive product liability and first amendment law. The trial court's order, however, expressly recited that summary judgment was being granted "on the basis that all of the claims asserted by the plaintiffs . . . for the post-1965 era are preempted by the provisions of the Cigarette Labeling and Advertising Act . . . and the Supremacy Clause of the United States Constitution."

A rule often followed by appellate courts is that "[i]n reviewing the judgment of the trial court where there are no findings of fact and conclusions of law requested or filed, the judgment must be upheld on any legal theory that finds support in the evidence." *Strackbein v. Prewitt*, 671 S.W.2d 37, 38 (Tex. 1984). Before 1978, a similar rule was followed in the review of summary judgments:

[I]f it affirmatively appears from the pleadings, admissions, depositions and affidavits that there is no issue as to any material fact upon which the outcome of the litigation depends, then summary judgment is the proper remedy even though it be granted upon a ground different from that specified in the motion.

*In re Price's Estate*, 375 S.W.2d 900, 903-04 (Tex. 1964) *see also* *Phil Phillips Ford, Inc. v. St. Paul Fire & Marine Ins. Co.*, 465 S.W.2d 933 (Tex. 1971); *Trigg v. Blakemore*, 387 S.W.2d 465 (Tex. Civ. App. 1965, writ ref'd n.r.e.).

In 1978, however, Rule 166a of the Texas Rules of Civil Procedure was amended to require that a motion for summary judgment "state the specific grounds therefor," and that "[i]ssues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." Tex. R. Civ. P. 166a(c). In construing the effect of the 1978 amendments to Rule 166a, the Texas Supreme Court has expressed a strong concern that, in an appeal from a summary judgment, issues to be reviewed by the appellate court must have been actually presented to *and considered by* the trial court. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 675-77 (Tex. 1979). Under *Clear Creek* and its progeny, a summary judgment can be neither reversed nor affirmed on any ground not specifically presented in the motion for summary judgment. *Dhillon v. General Accident Ins. Co.*, 789 S.W.2d 293, 295 (Tex. App. 1990, no writ); *Houston Lighting & Power Co. v. Wheelabrator Coal Services Co.*, 788 S.W.2d 933, 936 (Tex. App. 1990, no writ). Since 1978, therefore, the rule stated in *In re Price's Estate* and similar cases is no longer good law.

What, then, of a summary judgment order that expressly states the ground on which it is granted, when the underlying motion contained other independent grounds on which summary judgment was sought? We conclude that the ground specified in the judgment is the only one on which the summary judgment can be affirmed, for the following reasons. First, where a party has sought summary judgment on grounds A and B, a judgment expressly granting summary judgment on ground A, without mentioning ground B, can only be construed to mean that the trial court did not consider ground B. To construe it oth-



erwise would be to permit and encourage an inference that is neither warranted by the record nor in keeping with the spirit of Rule 166a (c). Accordingly, we conclude that the trial court in the present case did not consider defendants' "substantive-law" argument in deciding to grant the summary judgment.<sup>10</sup> Having reached this conclusion, it appears obvious that a ground not *considered* by the trial court is functionally identical to one not *presented* to the trial court; we can conceive of no reason to treat them differently.

Second, the following rule has, in the last ten years, become well established:

Where a trial court enters a summary judgment order *that does not specify the particular ground on which it is based*, the party appealing must show that each independent argument alleged in the motion for summary judgment is insufficient to support the trial court's order.

Insurance Co. of North America v. Security Ins. Co., 790 S.W.2d 407, 410 (Tex. App. 1990, no writ) (emphasis added). it is significant that (1) every opinion citing this rule has taken care to include the phrase emphasized above, indicating a unanimity of thought that the rule applies only when the summary judgment order does not specify the ground on which it is based; and (2) the rule has arisen

<sup>10</sup> There are, in addition, more explicit indications that the trial court in the present case did not consider the defendants' substantive-law ground. The record indicates, albeit incompletely, that the trial court initially granted a continuance of the summary judgment hearing in order to allow the plaintiffs more time for discovery. Subsequently, the defendants filed a "motion for reconsideration" and convinced the court that the preemption issue did not require additional discovery. The trial court then agreed to hear that part of the defendants' motions that requested summary judgment on preemption grounds. All defendants except R.J. Reynolds concede this point in their brief: "[T]he issue whether cigarettes can be found defective or unreasonably dangerous under Texas state law is not before this Court."

since 1978, indicating that its formulation may well have been in response to the 1978 amendments to Rule 166a and to the supreme court's 1979 opinion in *Clear Creek*. See *Kyle v. West Gulf Maritime Ass'n*, 792 S.W.2d 805, 807 (Tex. App. 1990, no writ); *Law v. Law*, 792 S.W.2d 150, 151 (Tex. App. 1990, writ denied); *Rabe v. Guaranty Nat'l Ins. Co.*, 787 S.W.2d 575, 576 (Tex. App. 1990, writ denied); *Tucker v. Atlantic Richfield Co.*, 787 S.W.2d 555, 558 (Tex. App. 1990, writ denied); *Dyer v. Shafer, Gilliland, Davis, McCollum & Ashley, Inc.*, 779 S.W.2d 474, 478-79 (Tex. App. 1989, writ denied); *Freedman v. Briarcroft Property Owners, Inc.*, 776 S.W.2d 212, 218 (Tex. App. 1989, writ denied); *Tilotta v. Goodall*, 752 S.W.2d 160, 161 (Tex. App. 1988, writ denied); *FDIC v. Attayi*, 745 S.W.2d 939, 942 (Tex. App. 1988, no writ); *Netterville v. Interfirst Bank*, 718 S.W.2d 921, 922, (Tex. App. 1986, no writ); *McCrea v. Cubilla Condominium Corp.*, 685, S.W.2d 755, 757 (Tex. App. 1985, writ ref'd n.r.e.); *Southerland v. Northeast Datsun, Inc.*, 659 S.W.2d 889, 891 (Tex. App. 1983, no writ); *Thomson v. Norton*, 604 S.W.2d 473, 476-77 (Tex. Civ. App. 1980, no writ). The logical corollary to this rule is, of course, that where a summary judgment order does specify the ground on which it is based, the party appealing need not refute other independent grounds that may have been alleged in the motion.

We are aware of a contrary holding in *Veytia v. Seiter*, 740 S.W.2d 64 (Tex. App. 1987), *aff'd*, 756 S.W.2d 303 (Tex. 1988). In *Veytia*, as here, summary judgment was sought on two grounds, federal preemption and substantive law. As here, the trial court's order specified that summary judgment was being granted on preemption grounds, apparently without mentioning the substantive-law argument. After concluding that summary judgment was not proper on preemption grounds, the appeals court decided that it was obliged to review the substantive-law ground to see if the summary judgment could be affirmed on that basis. Concluding that the substantive-law argument did



not support the summary judgment either, the court reversed the trial court's judgment.

We decline to follow *Veytia*. First, for its relevant holding, the court in *Veytia* relied on *In re Price's Estate* and other cases that were clearly undercut by the 1978 amendments to Rule 166a. Moreover, it did so without any discussion of those amendments or the supreme court's *Clear Creek* opinion. Second, the Texas Supreme Court affirmed the court of appeals' reversal of the summary judgment in *Veytia* solely on preemption grounds, *without addressing the substantive-law argument*. If the correct rule were that independent grounds contained in a motion for summary judgment but not considered by the trial court could nonetheless be a basis for the affirmance of a summary judgment, then the supreme court in *Veytia* would also have been obligated to consider, and reject, the substantive-law ground before it could affirm the court of appeals' reversal of the summary judgment.

We conclude, therefore, that the *Veytia* court incorrectly decided to review the substantive-law ground to determine if the summary judgment could be affirmed on that ground. We hold that where, as here, a summary judgment order specifies the ground or grounds on which it is based, without expressly ruling on other independent grounds alleged in the motion, such other grounds may not, on appeal, form the basis for affirming the summary judgment. On the basis of that holding, we decline to consider defendants' substantive-law arguments in this appeal.<sup>11</sup>

---

<sup>11</sup> If our earlier preemption discussion has seemed to imply that the plaintiffs would, in the absence of preemption, have viable causes of action, such expressions represent merely an assumption made only for purposes of our preemption decision. Nothing herein should be taken as an expression of opinion as to the merits of the plaintiffs' claims.

## CONCLUSION

For the foregoing reasons, the judgment of the trial court is reversed and the cause is remanded for further proceedings.

---

J. Woodfin Jones, Justice

[Before Justices POWERS, JONES, and SMITH\*; Justice SMITH not participating.]

Reversed and Remanded

Filed: February 6, 1991

[Publish]

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\* Before Earl W. Smith, Justice (retired), Third Court of Appeals, sitting by assignment. See Tex. Gov't Code Ann. § 74.003 (1988).

MAY 24 1991

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(5)

No. 90-1038

In The  
**Supreme Court of the United States**

October Term, 1990

THOMAS CIPOLLONE, individually and as  
Executor of the Estate of Rose D. Cipollone,  
*Petitioner,*  
vs.

LIGGETT GROUP, INC., a Delaware Corporation;  
PHILIP MORRIS INCORPORATED, a Virginia  
Corporation; and LOEW'S THEATRES, INC.,  
a New York Corporation,

*Respondents.*

On Writ Of Certiorari To The United States  
Court Of Appeals For The Third Circuit

JOINT APPENDIX

MARC Z. EDELL  
BUDD LARNER GROSS  
ROSENBAUM  
GREENBERG & SADE, P.C.  
150 John F. Kennedy  
Parkway  
CN 1000  
Short Hills, New Jersey  
07078-0999  
(201) 379-4800  
*Attorney for Petitioner*

H. BARTOW FARR, III  
ONEK, KLEIN & FARR  
2550 M Street, N.W.  
Suite 350  
Washington, D.C. 20037  
(202) 775-0184  
*Attorney for Respondents*

Petition For Certiorari Filed December 28, 1990  
Certiorari Granted March 25, 1991

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The Opinion of the United States Court of Appeals for the Third Circuit dated April 7, 1986 (reproduced at pp. 95a-108a of the Appendix to the Petition for a Writ of Certiorari)
The Opinion of the United States District Court, District of New Jersey dated September 20, 1984 (Reproduced at pp. 109a - 162a of the Appendix to the Petition for a Writ of Certiorari)
Related Case in Conflict with <i>Cipollone: Forster, et al. v. R.J. Reynolds Tobacco Co., et al.</i> , (Reproduced at pp. 164a - 180a of the Appendix to the Petition for a Writ of Certiorari)
Related Case in Conflict with <i>Cipollone: Dewey, et al. v. R.J. Reynolds Tobacco Co., et al.</i> , (Reproduced at pp. 181a - 226a of the Appendix to the Petition for a Writ of Certiorari)
Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1340 (Reproduced at pp. 1a - 5a of the Appendix to Respondents Brief on Petition for a Writ of Certiorari)
Related Case in conflict with <i>Cipollone: Carlisle v. Philip Morris, Inc., et al.</i> (Reproduced at pp. 6a - 49a of the Appendix to Respondents Brief on Petition for a Writ of Certiorari)

*Appendix A*

CHRONOLOGICAL LIST OF RELEVANT  
DOCKET ENTRIES

Thomas Cipollone, individually and as Executor of the  
Estate of Rose D. Cipollone,

Plaintiff/Appellant,

v.

Liggett Group, Inc., a Delaware Corporation, Phillip  
Morris, Incorporated, a Virginia Corporation; and Loew's  
Theatres, Inc., a New York Corporation,

Defendant/Respondent.

SUPREME COURT OF THE UNITED STATES

10/6/86 Plaintiff's petition for Writ of Certiorari, filed  
12/07/86 Defendant/Respondents' Reply, filed  
01/12/87 Order denying petition for Writ of Certiorari  
12/28/90 Plaintiff's petition for Writ of Certiorari, filed  
03/01/91 Defendant/Respondents' Reply, filed  
03/25/91 Petition for Writ of Certiorari Granted

UNITED STATES COURT OF APPEALS  
THIRD CIRCUIT

12/17/84 Defendant Loew's Theatres, Inc.'s & Liggett  
Group, Inc.'s notices of permission to appeal  
federal preemption ruling and seeking stay of  
all District Court proceedings.  
01/04/85 Order granting permission to appeal federal  
preemption ruling, denying application for  
stay.  
05/21/85 Defendant/Appellants' brief filed.  
07/12/85 Plaintiff/Appellee's brief filed.

04/07/86 Opinion of Third Circuit regarding preemption.

04/21/86 Plaintiff/Appellee's petition for rehearing.

05/09/86 Order denying petition for rehearing.

05/19/86 Amended judgment of Third Circuit Court of Appeals reversing preemption portion of USDC opinion of September 24, 1984, remanding for further proceedings consistent with opinion and taxing costs against appellee.

08/26/86 Plaintiff/Appellee's motion to vacate Third Circuit Opinion, filed.

09/05/86 Order denying Appellee's motion to vacate.

09/21/88 Notice of appeal by defendant, Liggett Group, Inc., regarding trial, filed.

10/03/88 Notice of appeal by plaintiff, filed.

10/05/88 Notice of cross appeal by defendants, Lorillard, Inc. and Phillip Morris, Inc., filed.

11/29/88 Plaintiff's brief, filed.

12/29/88 Defendants' briefs, filed.

01/05/90 Opinion of U.S. Court of Appeals for the Third Circuit.

01/19/90 Plaintiff's petition for rehearing and petition for rehearing *en banc*.

01/19/90 Motion by all defendants for rehearing before the panel and motion to stay the mandate.

01/31/90 Order denying all defendants' petitions for rehearing and requiring plaintiff to answer allegations of Point V.

01/31/90 Order denying plaintiff's motion for rehearing.

03/02/90 Order denying plaintiff's petition for clarification of opinion filed 1/5/90.

03/02/90 Order granting defendants motion for stay of mandate pending decision of N.J. Supreme Court in *Dewey v. R.J. Reynolds*

08/08/90 Defendants supplemental petition for rehearing before panel.

08/15/90 Plaintiff's reply to defendants petition for panel rehearing.

08/30/90 Judgment and opinion denying defendants petition for rehearing.

09/10/90 Certified copy of order of USCA Denying petitions of Philip Morris, Lorillard & Liggett for rehearing etc. & Mandate previously stayed, shall be issued forthwith filed 9/7/90.

09/10/90 Copy of Opinion of USCA filed 9/7/90. (GIBBONS, BECKER & NYGAARD)

09/10/90 Certified Copy of Judgment in lieu of mandate in Appeals 88-5732; 88-5770; 88-5771 & 88-5784 AFFIRMING in part as to order dismissing plaintiff's post-1965 failure to warn claims & intentional tort claims against Liggett, Lorillard and Philip Morris; AND DENYING remaining appeals and REMANDING to district court for NEW TRIAL filed 9/7/90.

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

08/02/83 Complaint and Jury Demand filed, 8/1/83.

08/10/83 Amended Complaint and Jury Demand, filed 8/5/83.

10/03/83 Notice of motion of defendant, Loew's Corp. for dismissal of amended complaint.

10/27/83 Second Amended Complaint and Jury Demand, filed 10/26/83.



- 11/04/83 Order denying motion of defendant, Loews Corp. for dismissal of the First Amended Complaint; granting plaintiff's leave to file the Second Amended Complaint; staying discovery as to the merits of the Second Amended Complaint as to all parties.
- 02/28/84 Motion by plaintiffs to strike the Seventh Affirmative Defense of defendant, Liggett Group, Inc., paragraph five of "Additional Defenses" of defendant, Philip Morris, Inc. and the Fifth Separate Defense of Loew's Theatres, Inc. returnable 2/26/84.
- 04/16/84 Motion by defendant, Loew's Theatres, Inc. for judgment on the pleadings, filed.
- 09/24/84 Opinion, filed 9/20/84. (Sarokin) Denying defendants' motion for judgment on pleadings & granting plaintiff's motion to strike defendants' preemption defenses.
- 09/24/84 Order granting plaintiff's motion to strike seventh affirmative defense of defendant, Liggett Group Inc.; paragraph five of additional defenses of defendant Philip Morris Inc. & fifth separate defense of defendant Loew's Theatre Inc.; & denying motion of defendant's for judgment on the pleadings filed 9/20/84. (Sarokin)
- 10/19/84 Motion by defendant, Loew's Theatres, Inc. for certification for interlocutory appeal on question of federal preemption and staying all pretrial proceedings.
- 12/07/84 Opinion granting motion to certify federal preemption issue and denying motion to stay proceedings pending appeal.
- 12/11/84 Order amending Court Order of 9/20/84; granting plaintiff's motion to strike seventh affirmative defense of defendant, Liggett Group, Inc.; denying defendants' motion for

- judgment on the pleadings; denying defendant, Loew's Theatres, Inc., motion for stay of all pretrial proceedings, etc. filed. 12/7/84 (Sarokin).
- 01/28/85 Certified copy of order from U.S.C.A. granting Loew's Theatres, Inc. permission to appeal; denying motion for a stay of proceedings in the U.S.D.C. pending disposition of appeal, filed. 1/23/85 (USCA #85-5074).
- 04/16/85 Motion by plaintiff to file Third Amended Complaint, filed.
- 06/04/85 Third Amended Complaint & Jury Demand, filed. 5/31/85.
- 08/07/85 Notice of appeal on behalf of defendants, Liggett Group, Inc., Philip Morris, Inc., and Loew's Theatres, Inc., filed 8/6/85.
- 08/19/85 Certified copy of order of USCA granting motion staying USDC order of 7/17/85, etc., filed. 8/16/85.
- 03/17/86 Copy of opinion of USCA, filed. 3/14/86.
- 03/17/86 Writ of Mandamus, directing J. Sarokin to vacate orders of 7/17/85 regarding protective order, filed. 3/14/86.
- 4/23/86 Copy of order from USCA granting the petition for a writ of mandamus & dismissing the appeals in USCA's 85-5529 & 85-5530 for lack of appellate jurisdiction with notation of appellate costs thereon, filed. 4/10/86.
- 05/20/86 Order regarding issuance of Writ of Mandamus in accordance with the U.S.C.A.'s Opinion & Order of 3/12/86, with costs in favor of defendant/petitioner Liggett Group, Inc., and against plaintiff/respondent Antonio Cipollone, individually and as Executor of the Estate of Rose D. Cipollone, filed. 5/15/86 (Sarokin).

- 05/27/86 Certified Copy of Amended Judgment in lieu of formal mandate reversing plaintiff's motion to the extent that it granted plaintiff's motion to strike defendants' Liggett Group & Loews Theatres preemption defenses; remanding for further proceedings with notation of appellate costs thereon, filed.
- 07/10/86 Motion by plaintiff, for clarification on the effect of preemption opinion by the Third Circuit on plaintiff's causes of action.
- 07/17/86 Defendants cross-motion for partial judgment on the pleadings and response to plaintiff's motion for clarification of preemption opinion.
- 09/25/86 Order striking evidence relating to collateral economic benefits allegedly generated by the tobacco industry as irrelevant and immaterial to the question of the risk vs. utility of cigarettes, pretrial discovery limited to preclude investigation into the areas, filed. (Sarokin)
- 10/06/86 Certified copy of order of USCA denying appellee's motion to vacate USCA's opinion of 4/7/86, filed. 10/2/86 (85-5073/50-4).
- 12/09/86 Order clarifying preemption opinion of Third Circuit; denying plaintiff's motion to strike defendants' preemption defense as to Counts 2, 6, 7, 8 & 9; denying defendants' motion to dismiss Count 2; granting defendants' motion to dismiss Counts 6, 7 & 8; granting plaintiff's motion to strike defendants' preemption defense the portion of Count 4 which alleges negligent research & testing; denying defendants' motion to dismiss portions of Count 4 which alleges negligent research & testing; granting defendants' motion to dismiss the portion of Count 9 which alleges the ineffectiveness of defendants' warnings, etc., filed (Sarokin).

- 02/17/87 Certified copy of order of USCA denying motion for a stay pending disposition of a Petition for Mandamus, filed. 2/13/87.
- 06/30/87 Certified copy of order of USCA denying petition for a Writ of Mandamus and reassignment, filed. 6/26/87.
- 07/24/87 Order on mandate from USCA, taxing costs in favor of plaintiffs, Cipollone, et al and Haines, et al and against defendants, Liggett Group, Inc., Philip Morris Incorporated, Loews Corporation and Loews Theatres, Inc., and defendants on Civ. 84-678 - Liggett Group, Inc. Loews Theatres Inc., R.J. Reynolds Tobacco Co., Philip Morris, Inc., and the Tobacco Institute, filed. 7/21/87 (Sarokin).
- 09/08/87 Motion by all defendants for partial summary judgment on the pleadings, filed 9/4/87.
- 10/28/87 Order granting defendants' motion for partial summary judgment on the pleadings.
- 11/23/87 Motion by plaintiff for summary judgment, filed 11/20/87 (brief).
- 01/20/88 Motion by defendant Liggett Group Inc. for summary judgment, filed.
- 01/27/88 TRIAL WITH JURY MOVED BEFORE HON. H. LEE SAROKIN
- 06/17/88 Judgment in the sum of \$400,000.00 in favor of plaintiff, Antonio Cipollone and against defendant Liggett Group, Inc. and Judgment of No Cause for Action for defendants Philip Morris and Lorillard Inc., (formerly Loews Theatres, Inc.) and all against plaintiff Antonio Cipollone, filed. 6/15/88. (Sarokin)
- 06/30/88 Motion by plaintiff for partial new trial on the issue of quantum of compensatory damages sustained by Rose Cipollone during her lifetime, filed.

- 07/05/88 Motion by defendant Liggett Group, Inc., for entry of judgment notwithstanding the verdict, or in the alternative for the entry of an order for a new trial on the grounds that the finding of liability on plaintiff's express warranty claim is against the weight of the evidence, filed. 7/1/88
- 08/24/88 Order denying defendant Liggett Group's motion for judgment notwithstanding the verdict, for a new trial, and denying plaintiff motion for a partial new trial on the issue of the quantum of compensatory damages, to correct the judgment to add interest and damages, filed. (Sarokin)
- 05/11/90 Order substituting Thomas Cipollone as plaintiff, filed 5/10/90. (Hedges)
- 12/13/90 Case management order in Civ 84-678 (HLS) which makes reference to *Cipollone* Civ. 83-2864 counsel for plaintiff's therein intent to petition for writ of certiorari to U.S. Supreme Court on or before 12/28/90; in which case all proceedings in Cipollone will be stayed etc. (HEDGES).
-



# PLAY SAFE

## SMOKE CHESTERFIELD

THEY'RE *MUCH Milder* WITH  
• NO UNPLEASANT AFTER-TASTE

*because—* A. CHESTERFIELD  
uses the world's best, mild, ripe  
tobaccos, pre-tested for the most  
desirable smoking qualities

B. CHESTERFIELD keeps these  
tobaccos tasty and fresh with tried  
and tested moistening agents—pure  
natural sugars, costly glycerol—  
nothing else.

C. CHESTERFIELDS  
are wrapped in cigarette paper of  
the highest purity.

BEHOLD THE MARK OF A WELL-KNOWN RESEARCH ORGANIZATION

### CHESTERFIELD

CONTAINS ONLY INGREDIENTS THAT GIVE YOU  
*the Best Possible Smoke—*  
AS TESTED AND APPROVED BY SCIENTISTS  
FROM LEADING UNIVERSITIES



*This advertisement appears in*  
Collier's.....Aug. 2, 1932  
Life.....Aug. 14, 1932  
Nat. Rev. Pub.....Aug. 25, 1932

# NOSE, THROAT,

and Accessory Organs not Adversely  
Affected by Smoking Chesterfields

**FIRST SUCH REPORT EVER PUBLISHED  
ABOUT ANY CIGARETTE**

Appendix C

10

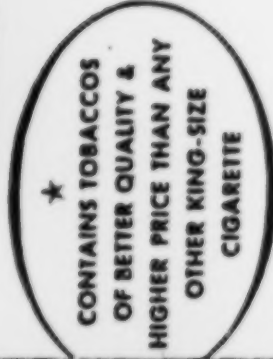
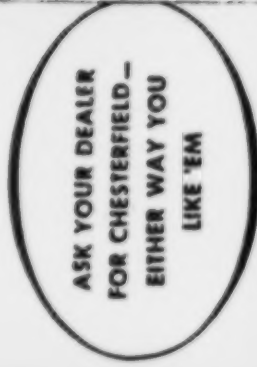
A responsible consulting organization has reported the results of a continuing study by a competent medical specialist and his staff on the effects of smoking Chesterfield cigarettes.

A group of people from various walks of life was organized to smoke only Chesterfields. For six months this group of men and women smoked their normal amount of Chesterfields - 10 to 40 a day. 45% of the group have smoked Chesterfields continually from one to thirty years for an average of 10 years each.

At the beginning and at the end of the six-months

period each smoker was given a thorough examination, including X-ray pictures, by the medical specialist and his assistants. The examination covered the sinuses as well as the nose, ears and throat.

The medical specialist, after a thorough examination of every member of the group, stated: "It is my opinion that the ears, nose, throat and accessory organs of all participating subjects examined by me were not adversely affected in the six-months period by smoking the cigarettes provided."



**Buy CHESTERFIELD - Much Milder**

Copyright 1952 Lorain & Sons, Inc. - C

*Appendix D*

PLAINTIFF'S EXHIBIT 2700

December 24, 1953

**CONFIDENTIAL**

PRELIMINARY RECOMMENDATIONS FOR  
CIGARETTE MANUFACTURERS

---

Because of the grave nature of a number of recently highly publicized research reports on the effects of cigarette smoking, widespread public interest has developed, causing great concern within and without the industry.

These developments have confronted the industry with a serious problem of public relations. Obviously, that problem would be quickly solved if the adverse publicity would cease and people would stop talking about the whole matter.

But there is no evidence that the publicity has abated, or is about to abate, or that the research workers who are critical of cigarettes are going to cease these criticisms. A check among national magazines indicates that other periodicals are considering articles on the subject. Among them are Woman's Home Companion, Look and Cosmopolitan. The February issue of Pageant has an article publicizing the Wynder researches.

There is nothing the manufacturers can say or refrain from saying that can stop people from being interested in their health, nor allay their fear of cancer. So long as the causes and cure of this dread disease remain unknown people will be subject to waves of fear regarding it.



## CONFIDENTIAL

It is important that the industry do nothing to appear in the light of being callous to considerations of health or of belittling medical research which goes against cigarettes.

The industry should lose no time in making it completely clear to the American people that it is not unmindful of the public health.

There is an evident urgency about the matter which makes it advisable to suggest certain immediate steps. A fully rounded-out program will be developed when there has been enough time to make a more comprehensive study of additional aspects of the problem and to think through various courses of action and projects.

The situation is one of extreme delicacy. There is much at stake and the industry group, in moving into the field of public relations, needs to exercise great care not to add fuel to the flames.

The recommended approach is conservative and long-range. We do not believe the industry should indulge in any flashy or spectacular ballyhoo. There is no public relations nostrum, known to us at least, which will cure the ills of the industry with one swallow. The need is for a soundly conceived and effectively executed program based upon continuing research and factual information.

It would be a mistake for the industry group to inaugurate the contemplated program unless it is prepared to maintain it for a minimum of three years. The results of some of the medical research suggested could hardly be in hand short of that period of time.

## CONFIDENTIAL

The underlying purpose of any activity at this stage should be reassurance of the public through wider communication of facts to the public. It is important that the public recognize the existence of weighty scientific views which hold there is no proof that cigarette smoking is a cause of lung cancer.

In connection with the proposed activity, it is impossible to overlook the fact that some of the industry's advertising has come in for serious public criticism because of emphasis on health aspects of smoking.

This, of course, is a problem for the individual companies and will not be included in this program. But it must be recognized that some of the advertising may have created a degree of skepticism in the public mind which at the start at least could affect the believability of any public relations effort.

The decision of a group of companies in the industry to take joint action needs to be implemented by the selection of a Chairman and Treasurer and the adoption of procedures for the collection and disbursement of funds. In addition, it is important that the group establish procedures for expeditious clearance of any policy statements it may decide to issue.

The following recommendations are submitted for consideration by the manufacturers:

1. Headquarters of the Committee. Headquarters should be established in New York City.
2. Name of Committee. The following name is submitted: Tobacco Research Committee.

## CONFIDENTIAL

3. Set-up and function of Committee. The word "research" should be included in the name of the Committee to establish the fact that the group will carry on or sponsor fundamental scientific research and will not be solely an information agency. The Committee's research should be of two kinds:

- (a) scientific, medical research
- (b) editorial and statistical research into pertinent phases of the current controversy.

The Committee should be prepared on competent scientific advice from outside the industry to give substantial support to objective non-duplicating medical research that is most likely to be productive promptly of convincing results.

The Committee should have a Director of Research, a medical research authority of unquestioned national repute. The Director would have such research assistants as may be required. The Research Director would serve as spokesman for the Committee on medical and scientific matters.

The Committee should also form an Advisory Board composed of a group of distinguished men from the fields of medicine, research and education. These should be men whose integrity is beyond question.

The Director of Research and the Advisory Board should be consulted by the Committee on these points:

- a. What areas of objective medical research should be undertaken? Should it be confined to the problem of lung cancer or extend to other aspects of cigarette smoking and health?

## CONFIDENTIAL

- b. How and where and under what auspices should the industry carry out its joint research effort? Should a Research Foundation be established which would finance research projects by existing laboratories and institutions, and if so, which ones? Or should the industry establish a new jointly financed research laboratory to carry on the work?
- c. How much money, in the opinion of the Committee's Director of Research and its Advisory Board, should the member companies appropriate for medical research undertaking?

4. Public Statement by cigarette makers. The first public statement of the Committee should be designed to clarify the problem and to reassure the public that: (a) the industry's first and foremost interest is the public health; (b) there is no proof of the claims which link smoking and lung cancer; and (c) the industry is inaugurating a joint plan to deal with the situation.

This statement should be:

- (a) distributed widely as news, and to employees, stockholders, distributors, tobacco growers, dealers, suppliers, public officials, national and community leaders and other groups;
- (b) placed as an advertisement in leading newspapers and in leading news magazines.

(Draft of suggested copy of statement is attached.)

5. Research Sub-committee. A scientific research sub-committee should be set up by the top committee to

## CONFIDENTIAL

be composed of Research Directors of member companies for the purpose of:

- a. working with the Committee's Director of Research;
- b. reviewing scientific materials assembled for public information;
- c. initiating scientific material for educational use by the Committee.

6. Continuing Public Relations Research. There should be set up at the headquarters of the Committee, under the direction of the Research Director, a continuing research project to collect, coordinate and disseminate (where practical) available information on various medical research activities bearing on pertinent phases of cigarettes and health. As time permits, this project would explore such questions as:

- a. Why do mice show no tendency to develop lung cancer in experiments where they live half their lives in smoke-filled chambers?
- b. Why, in some experiments, do mice show a tendency to develop skin cancer, when painted over a period with tobacco tars - whereas efforts to produce lung cancer in mice, by keeping them immersed in tobacco smoke, have failed?
- c. Why has the rise in lung cancer been most marked among men, although the greatest rise in the use of cigarettes in the last 25 years seems to have been among women?
- d. Why does the rate of lung cancer vary so greatly between certain cities, although the per capita rate of cigarette consumption in these cities seems approximately the same?

## CONFIDENTIAL

- e. What is the correlation, if any, between lung cancer and certain changes in American life - such as steadily increased industrialization, increased urbanization, and the rising problem of atmospheric pollution in many of our urban centers?
- f. Why is cancer of the lung on the increase, whereas no such rise appears in similar illness of the tongue, lip or throat?
- g. Is the incidence of lung cancer less in rural areas than it is in urban areas, and if so what is the per capita consumption of cigarettes in these respective areas?
- h. Is the incidence of lung cancer greater in cold climates than in mild climates and in the south, and if so what is the per capita consumption of cigarettes in the respective areas where this differential seemingly occurs?
- i. The figures of the Damon Runyon Cancer Fund estimate in 1952 twenty-two thousand deaths from lung cancer in the United States in an estimated population of over one hundred fifty million individuals. The report in the New York Herald Tribune as of Sunday, December 13th, quoted the British Medical Society as advising that there were thirteen thousand cases of lung cancer in Great Britain last year. With Britain approximately one-quarter the size of the United States, their incidence of lung cancer would be approximately four times as great as the United States. What are the facts about this and what is the incidence of climate, etc. in the development of lung cancer?
- j. Is it possible that England, with a larger percentage of lung cancer incidence, may possibly have obtained this result due to the fact



## CONFIDENTIAL

that the tobacco for their cigarettes is not treated in any way with casing? Should the efficacy of casing used in the manufacture of American cigarettes be studied as possibly an antidote to the deleterious effects of tobacco, if any?

- k. With the extension of human life due to miracle drugs, etc. what is the percentage of the increase of lung cancer, if any, comparable to other diseases during the past ten years?
- l. What may be the effect on the significance of statistical comparisons of more accurate diagnosis during the past few years into specific causes of death?
- m. What are the benefits and enjoyment derived from smoking, both by scientific tests and by measurement of smoker reactions and attitudes?
- n. What are the smoking habits of long-lived distinguished public leaders?
- o. What are the human ills erroneously attributed to tobacco over the centuries?

There are many similar lines of inquiry which have so far been pursued without definitive answers. They should be explored still more vigorously, and with still greater resources; and the results studied for their usefulness as a matter of public information.

7. Public Opinion Poll. A national survey of public opinion is needed to determine attitudes toward cigarettes and tobacco held by (a) the medical profession; and (b) the public at large. The results of such a poll should be helpful in developing more effectively the continuing program of public information that may be required to

## CONFIDENTIAL

offset anti-cigarette propaganda and to give justified reassurance to the public.

8. White Paper. The Committee should distribute as soon as possible a scientific White Paper digesting current available opinion of authorities on cigarette smoking and lung cancer.

9. Relations with the Press. An important function of the Committee will be to see that the pertinent facts are made available to the press.

In addition to any current statements or releases that may be issued, background memoranda of facts may be circulated to the press when occasion requires. The Committee, of course, will be alert to what is being published or said on the subject of concern to the industry and if any misstatements appear, the facts will be offered to proper sources.

In the case of magazines, the facts will be placed in the hands of editors for such use as may suite their purposes. Available for this work will be the publicity staff of public relations counsel. Any publicity activities, of course, will be adapted to current needs and opportunities as indicated by trends in public and professional opinion and discussions.

10. Radio and Television. Millions of people are informed and their attitudes influenced by radio and television. It will be important to keep commentators and other key people in broadcasting aware of the Committee's existence and of any facts it may assemble.

Moreover, the Committee should be on the alert for public discussion programs where spokesmen for the

## CONFIDENTIAL

facts as the Committee sees them might be welcome. Public relations counsel has a radio and television specialist who can function in this area.

Plans should be explored for giving attention to the positive aspects of smoking through motion pictures suitable for television use as well as group showings.

11. Committee as a source of facts. The work of the committee in the field of public information should be such as to establish the Committee as a reliable source of industry facts on this subject, and a flow of enquiry by mail, telephone and personal visitation most likely can be expected gradually to develop. The committee should develop as rapidly as possible materials, data and statistics bearing on various aspects of the cigarette industry, and have adequate staff to insure meticulous attention to all enquiries from the press or public.

12. Information for special groups. Attention should be given to material on cigarettes going to special groups such as women's clubs, garden clubs and other organizations that have discussion and study programs, and corrections offered in the case of any misinformation noted.

13. Washington Activities. The Washington office and staff of public relations counsel will be available to place accurate and up-to-date information into the hands of appropriate Committees of Congress, Congressmen and Senators from tobacco states, and interested government officials.

14. Materials for company distribution. It is extremely important that the facts and views as developed by the Committee be communicated promptly to

## CONFIDENTIAL

various elements within the industry itself. Employees, stockholders, distributors, growers and others should know the facts in order that they can speak intelligently when the subject is discussed in their own groups.

15. Medical Groups. The Committee will need to keep abreast of programs of various medical associations and groups.

16. Cooperation of other groups. The Committee should explore and develop to the greatest extent that it can, the possibility of cooperation from allied groups such as growers, retailers and distributors.

## CONCLUSION

As already noted, it has not been practical to develop a full program in the brief space of time available. The effort has been to outline a basic policy approach to the problem and to indicate the direction which the activity should take in implementing policy.

We believe that the correct path to follow is one of patient, continuing, sure-footed presentation of the facts to the public — facts supported and documented by careful research.

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*Appendix E*  
DEFENDANT'S EXHIBIT DJT 4053

## SURVEY IDENTIFICATION

- |                         |  |
|-------------------------|--|
| 1. COUNTRY:             | UNITED STATES  |
| 2. TITLE:               | THE GALLUP POLL  |
| 3. DATE:                | JUNE 12-17, 1954   |
| 4. SURVEY NUMBER:       | AIPO 532   |
| 5. SURVEY ORGANIZATION: | AMERICAN INSTITUTE<br>OF PUBLIC OPINION                            |
| 6. SPONSOR:             | LEADING REPUBLICAN,<br>DEMOCRATIC<br>AND INDEPENDENT<br>NEWSPAPERS |

Q. 12A. HAVE YOU HEARD OR READ ANYTHING  
RECENTLY TO THE EFFECT THAT CIGARETTE  
SMOKING MAY BE A CAUSE OF CANCER  
OF THE LUNG

- |      |                       |
|------|-----------------------|
| 1290 | 1. YES                |
| 144  | 2. NO                 |
| 1    | 0. NO CODE OR NO DATA |
- 

*Appendix F*

## Some Answers for the Smoking Public

*Today – from the Industry itself –  
comes this 11 Point Report  
on one of the Most Contradictory  
Issues of our time.*

Tobacco has been an important part of American life for more than 350 years. And throughout its history, tobacco has been both widely criticized and extravagantly praised.

Renewed attention to smoking and health questions in recent months may have given the impression that something new has been found involving tobacco. This has naturally led to questions about the position of the tobacco industry. We want to make our position clear.

Smoking has come in for scientific investigation because of statistical association studies, the meanings of which are still disputed in scientific circles. These studies associated smoking, especially cigarette smoking, with lung cancer incidence and raised many questions for scientific research.

To help answer those questions, the tobacco industry in 1954 established the Tobacco Industry Research Committee, to provide research grants to scientists working in



recognized research institutions. This program is continuing on an expanded scale.

Scientists in all parts of the world have been studying tobacco smoke, conducting experiments with animals, and investigating many possible causes of lung cancer.

No clear-cut answer has resulted. The number of suspects under study has broadened to include viruses, previous lung ailments, environment, heredity, air pollutants, occupational exposures, psychological patterns, constitutional differences, diet, stress and strain and others.

As of today, the basic causes of lung cancer remain unknown.

Here are some pertinent facts developed through lung cancer research:

**1. Non-smokers as well as smokers get cancer of the lung.**

By far the vast majority of smokers never get the disease. This means that smoking is not necessary to develop lung cancer, and that long-time smoking does not necessarily lead to lung cancer.

**2. The widening gap between male and female lung cancer death rates is not consistent with increased smoking by women.**

Thirty years ago lung cancer death rates showed three men for every woman. Latest figures show more than six men for every woman. This is contrary to what was expected if smoking were a major fact in lung cancer,

since there has been a big increase in smoking among women since the 1920's.

**3. Tobacco smoke has failed to produce long cancer in animals in research experiments, although other substances have done so.**

**4. Viruses are among the substances that have resulted in experimental lung cancer in animals.**

This is one important reason why the virus theory of cancer causation is getting increased attention.

**5. Scientists have been analyzing cigarette smoke for years and have been unable to specify any substance that accounts for lung cancer.**

**6. Lung cancer death rates differ greatly from city to city and from country to country.**

These differences do not conform to smoking patterns. As a result, environment, air pollutants, traffic conditions, and occupational hazards are also getting intensive study.

**7. A medical history of previous lung ailments is significantly related to the development of lung cancer.**

Medical advances have enabled people with other lung ailments to live long enough to get cancer. Many scientists are finding that cancer often starts at old lung scars left by tuberculosis and influenza.

**8. Lung cancer was known to exist long before cigarettes became popular, but was seldom spotted.**

Even before the Civil War, a few scientists were warning that the disease was more common than supposed, but was escaping detection because it was hard to diagnose.

**9. The increase in lung cancer deaths being reported is due in part to better means of diagnosis, more frequent recognition of the disease, and the growth and aging of the population.**

Most cases appear in older people. There is disagreement over how much of the increase results from these factors; some scientific studies say as high as 95 per cent.

**10. Studies in the U.S., Canada and England indicate that lung cancer rates are nearing a peak and may level off.**

This is not consistent with the theory about smoking.

**11. There are several types of lung cancer of differing origin, and it is difficult to tell which is which.**

In fact, new studies say that the type of lung cancer being increasingly found is not the type which some have associated with inhaled substances, such as cigarette smoke.

These are some of the reasons why the tobacco industry believes that singling out tobacco is not an accurate reflection of research findings.

The theory involving cigarette smoking is often presented as a simple answer. And some people forget that it is still just a working theory, to be tested by further research, along with other theories.

Scientific advisors inform us that when much more is known about the basic origins of lung cancer, medical science will be able to specify whether a particular factor or factors have a causative role – and whether such a role might be direct or indirect, incidental or important.

Meanwhile, the tobacco industry is cooperating in efforts to learn and to make known all the facts.

Research continues to provide new and broader perspectives. The solutions to our nation's health problems will come through further research – just as research has enabled the American people to enjoy today better health and longer lifetimes than ever before in our history.

**The Tobacco Institute, Inc.,**

808 Seventeenth Street, N.W.,  
Washington 6, D.C.

Proposed Ad No. 2-October 22, 1962

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*Appendix G*

## PLAINTIFF'S EXHIBIT 2900

NEW YORK HERALD TRIBUNE, MONDAY, JANUARY 4, 1954

## **A Frank Statement to Cigarette Smokers**

RECENT REPORTS on experiments with mice have given wide publicity to a theory that cigarette smoking is in some way linked with lung cancer in human beings.

Although conducted by doctors of professional standing, these experiments are not regarded as conclusive in the field of cancer research. However, we do not believe that any serious medical research, even though its results are inconclusive should be disregarded or lightly dismissed.

At the same time, we feel it is in the public interest to call attention to the fact that eminent doctors and research scientists have publicly questioned the claimed significance of these experiments.

### **Distinguished authorities point out:**

1. That medical research of recent years indicates many possible causes of lung cancer.
2. That there is no agreement among the authorities regarding what the cause is.
3. That there is no proof that cigarette smoking is one of the causes.
4. That statistics purporting to link cigarette smoking with the disease could apply with equal force to any one of many other aspects of modern life. Indeed

the validity of the statistics themselves is questioned by numerous scientists.

We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business.

We believe the products we make are not injurious to health.

We always have and always will cooperate closely with those whose task it is to safeguard the public health.

For more than 300 years tobacco has given solace, relaxation and enjoyment to mankind. At one time or another during those years critics have held it responsible for practically every disease of the human body. One by one these charges have been abandoned for lack of evidence.

Regardless of the record of the past, the fact that cigarette smoking today should even be suspected as a cause of a serious disease is a matter of deep concern to us.

Many people have asked us what we are doing to meet the public's concern aroused by the recent reports. Here is the answer:

1. We are pledging aid and assistance to the research effort into all phases of tobacco use and health. This joint financial aid will of course be in addition to what is already being contributed by individual companies.
2. For this purpose we are establishing a joint industry group consisting initially of the undersigned. This group will be known as TOBACCO INDUSTRY RESEARCH COMMITTEE.



3. In charge of the research activities of the Committee will be a scientist of unimpeachable integrity and national repute. In addition there will be an Advisory Board of scientists disinterested in the cigarette industry. A group of distinguished men from medicine, science, and education will be invited to serve on this Board. These scientists will advise the Committee on its research activities.

This statement is being issued because we believe the people are entitled to know where we stand on this matter and what we intend to do about it.

## TOBACCO INDUSTRY RESEARCH COMMITTEE

5400 EMPIRE STATE BUILDING, NEW YORK 1, N. Y.

### SPONSORS:

THE AMERICAN TOBACCO COMPANY, INC.  
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BENSON & HEDGES  
*Joseph F. Callman, Jr., President*

BRIGHT BELT WAREHOUSE ASSOCIATION  
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TOBACCO ASSOCIATES, INC.  
(An organization of flue-cured tobacco growers)  
*J.B. Hutson, President*

UNITED STATES TOBACCO COMPANY  
*J.W. Peterson, President*

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*Appendix H*

DEFENDANT'S EXHIBIT DJT-4064

WEDNESDAY, JULY 24, 1967

The New York Times

## TAR IN CIGARETTES LUNG CANCER CLUE

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Federal Aide Says Research  
Fails to Pin Down 'Culprit'  
— Veterans Aid Studies

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### FILTER VALUE IN DOUBT

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Warning Labels on Packages  
Are Opposed by Witnesses  
at House Investigation

WASHINGTON, July 23 (AP) — Public health officials said today that tiny amounts of tars in cigarette smoke might offer a clue to the possible relationship between smoking and lung cancer.

Dr. John R. Heller, director of the Government's National Cancer Institute, told a House Government Operations subcommittee:

"There is mounting evidence that when tobacco is burned at about 800 degrees there is a chemical change in

certain hydrocarbons which bring about certain cancer causing compounds.

"We do not know which of these compounds is the culprit. They are very complicated chemical compounds about which we need to know more."

### View on Warning Labels

Dr. Heller and another official of the Department of Health, Education and Welfare, Dr. Leroy E. Burney, Surgeon General of the United States Public Health Service, declined today to recommend printing of "warning labels" on cigarettes.

"We don't have sufficient evidence at this time" of actual causative cancer agents in tobacco to take such a step, Dr. Burney testified.

The subcommittee chairman, Representative John A. Blatnik, Democrat of Minnesota, asked what the witnesses thought about labeling cigarettes like pills — take only so many a day.

Smiling, Dr. Burney said that he didn't believe "many of us read too much of the fine print on things we buy" and he didn't think it would do much good.

He noted that "I enjoy smoking myself" and said that the Public Health Service felt it should keep smokers informed of its findings but could not go beyond that.

### Hopeful as Preventatives

Dr. Heller, in discussing filter tips, said that the important thing was to find out first what was in tobaccos. After this basic information is acquired, he

added, "then preventive steps can be taken, and we think soon."

He declared that "we don't believe any filter can selectively filter out the component or components in the tars that are responsible for lung cancer."

He commented that "we have no desire or intent to join the Anti-tobacco League," that so long as people "enjoy" smoking every effort should be made to make it safe.

Dr. Burney told the subcommittee that "further research - both on the general question of tobacco and its relationship to lung cancer and on the question of filtration or other means of modifying cigarettes - is needed."

He said that the Public Health Service expected to report findings of "real significance" by spring on the basis of a statistical study of 220,000 World War I veterans and their smoking habits.

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#### Nicotine Left in the Clear

WASHINGTON, July 23, (UPI) - Dr. Heller testified that, so far as the scientists knew, the nicotine in cigarettes was "not involved in lung cancer."

Dr. Burney suggested modification of cigarettes to reduce harmful effects.

He said it had been proposed theoretically that cigarettes could be modified in three ways: By changing the

tobacco leaf, by reducing the burning temperature or by filtering some elements from the smoke.

He declared that the Public Health Service felt that it had a duty to issue its July 12 statement of increasing evidence that excessive cigarette smoking was a cause of lung cancer.

He said that the Government was conducting three major investigations of smoking, these being besides that covering veterans: studies involving lung cancer in women and the relationship to lung cancer of occupation and geographical residence.

The primary subject of the subcommittee investigation is the accuracy of advertising asserting that filtertips reduce the hazards of cigarette smoking. The hearing is to be resumed tomorrow.

Mr. Blatnik said today that he was puzzled by the fact that "nobody seems to know much about filters."

"I venture to say that more is being spent to promote the smoking of filter-tip cigarettes than to find the cause of cancer," he remarked.

In the face of much questioning the witnesses pressed the view that they did not know whether the filters reduced smoking hazards. Dr. Burney said that research was "insufficient to warrant a conclusion at this time" on the effectiveness of the filter tips.

The tars, he testified, apparently give to cigarettes the taste smokers enjoy.

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*Appendix I*

## PLAINTIFF'S EXHIBIT 2014

Ted Bates &amp; Company

December 8, 1967

CONFIDENTIAL

Mr. Reginald Wells  
 Tiderock Corporation  
 444 Madison Avenue  
 New York, New York

Re: RESEARCH SUMMARY

Dear Reg:

Attached is a written summary of the method and consensus of results from our 4 presearch sessions, as discussed this morning.

The consensus represents the combined opinions of the five of us who attended all four complete sessions, plus our moderator.

For anyone listening to the tapes, it should be noted that when an ad is in first position it usually produces a negative or lukewarm response; when the same ad is in last position, it produces a relatively enthusiastic response. This type of response variation is common in this form of testing, which is why we always conduct sessions in pairs, reversing the order of presentation the second time.

I think the net from these sessions is:

1. The objective "restore controversy" should be changed to "neutralize effect of government action".
2. It may well be that this can better be accomplished by P.R. work among legislators and doctors than through advertising. Smokers already question the government's conclusions about smoking - but they have little knowledge of the lengths the anti-smoking forces are apparently willing to go against the industry and cigarette advertising.
3. If any consumer advertising is done, a direct approach appears called for - the more directly it challenges the Surgeon General's position, the better. But a direct approach runs grave risks of having more negative effects in stirring up public controversy and publicity and bringing on government action than any possible positive effects.
4. An indirect approach would appear to be a mistake.

Sincerely,

/s/ David C. Loomis  
 David C. Loomis

DCL/ic  
 Attachment  
cc: Mr. Rosser Reeves

Ted Bates & Company

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SUMMARY REPORT OF 4 GROUP INTERVIEW

SESSIONS WITH SMOKERS

OBJECTIVE: To determine reaction of representative smokers to 5 possible Tobacco Institute campaign approaches ranging from indirect to direct.

SAMPLES: Respondents were recruited via a screening questionnaire to obtain 4 similar panels of adult male cigarette smokers (4 packs/wk. or more) who had heard of the Surgeon General's report. Each panel was also selected to be representative of the attitudes of smokers in the Agency's recent 20-city survey on 2 questions:

	<u>Proportion of Smokers</u>	
	<u>Agree</u>	<u>Disagree/</u>
		<u>Not Sure</u>
1. The Surgeon General's report on cigarettes is enough to make a person stop smoking.	30%	70%
2. The government has proved to me that smoking causes serious health problems.	50%	50%

The screening questionnaire was used to make sure we had panels who were both aware of and involved in the cigarette/health issue.

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APPROACHES TESTED

Sessions 1 and 2

- a) World Conference on Respiratory Illness - indirect approach - print only.
- b) Cigarette-Health Controversy - middle approach - print only.
- c) "Communism Causes Cancer" - direct approach - print only.

Sessions 3 and 4

- d) "Of Mice and Men and Cigarettes" - direct approach - print and TV.
- e) Smog - indirect approach - print and TV.

SUMMARY OF RESULTS

A. GENERAL

1. A controversy already exists with smokers on the position taken by the Surgeon General's report - but they would prefer not to be reminded of it. Thus the objective of an Institute campaign: "to restore controversy" is probably the wrong one as far as the public is concerned.

Because they are still smoking, smokers are compelled to feel the government has not proved its case. If they want to hear anything, it is reassurance that smoking does not cause lung cancer - not that there is a difference of opinion.

2. Smokers agree that smoking is "unhealthy" - but don't translate this as

CONFIDENTIAL

meaning it causes lung cancer or any other specific, potentially fatal, disease. Smoking may cause shortness of breath, a cough or even a shorter life – but they don't expect it to give them lung cancer.

3. The tobacco industry (or the Tobacco Institute) can speak out:
  - a) Smokers do want positive evidence on the "other" side to neutralize the government's position.
  - b) They would prefer the industry to respond immediately to government attacks, rather than after the news has cooled.
  - c) Silence by the industry may, in itself, be a tacit acknowledgment of guilt.
  - d) There is a basic tendency to distrust any presentation of the other side – however factual – by the Tobacco Institute. The industry's motive is assumed to be self-interest – or to "sell more cigarettes". This does not mean that smokers don't want the industry to speak, but that great care must be taken to make it clear that the facts or opinions presented are not "fixed" by the Institute.
4. There is very little awareness of any current or planned government action against cigarettes beyond the Surgeon General's report and the pack warning. Smokers view the issue as one between the government and themselves, as smokers, rather than between the government and the industry.

CONFIDENTIALB. ADVERTISING APPROACHES

1. The direct approaches ("Communism" and "Mouse") produce the strongest initial reactions – both favorable and unfavorable – but a better understanding of what the industry is trying to do.
2. After close study, however, the direct approaches are vulnerable – particularly on the clarity and source of the factual information – plus the basic distrust of anything presented by the industry.
3. The indirect approaches ("Smog" and "World Conference") are also vulnerable on the same grounds.
4. The indirect and middle approaches have additional problems:
  - a) They raise the "controversy" issue, rather than neutralize it.
  - b) They are seen as confusing the issue – or even implying guilt to cigarettes – by suggesting the blame may lie elsewhere.
5. The middle approach ("Cigarette/Health Controversy") was universally assumed to be presenting only one side (the industry's) on first exposure. The 5 anti-smoking doctor's statements were read but not seen. All 10 statements were assumed to be challenging the Surgeon General's report (including the lead statement by the Surgeon General) until the panelists were almost forced to become aware that 5 statements were pro; 5 con.

David C. Loomis

DCL/ic



*Appendix I*

## PLAINTIFF'S EXHIBIT 2920

REPRINTED FROM THE WASHINGTON POST AND OTHER  
NEWSPAPERS. TUESDAY, DECEMBER 1, 1970.

*After millions of dollars and over 20  
years of research:*

## **The question about smoking and health is still a question.**

For the past two decades, hundreds of scientists have performed thousands of experiments and written millions of words in a dedicated effort to explore the question of smoking and health.

Result. So far, in spite of this massive effort, there are eminent scientists who question whether any causal relationship has been proved between cigarette smoking and human disease - including lung cancer, coronary heart disease, or emphysema. They believe that years more of exhaustive investigation will be required to clear up what is indeed now a muddy picture.

What has been learned is this: establishing cause-and-effect relationships, which have been claimed to exist by government agencies and other groups, is much more complex than originally thought. In fact, even those who claim a cause-and-effect relationship has been proved admit that no particular ingredient, as it occurs in cigarette smoke, has been demonstrated as the cause of any particular disease.

**Who sponsored the research**

There are those who believe that voluntary health associations have provided the money for most of this research. Others think it was strictly a project of the various U.S. Government departments.

It is true that both have been . . . and continue to be . . . active in this field. But - a major portion of this scientific inquiry has been financed by the people who know the most about cigarettes and have a great desire to learn the truth . . . the tobacco industry.

And the industry has committed itself to this task in the most objective and scientific way possible.

**A \$35,000,000 program**

In the interest of absolute objectivity, the tobacco industry has supported totally independent research efforts with completely non-restrictive funding.

In 1954, the industry established what is now known as CTR, the Council for Tobacco Research - USA, to provide financial support for research by independent scientists into all phases of tobacco use and health. Completely autonomous, CTR's research activity is directed by a board of ten scientists and physicians who retain their affiliations with their respective universities and institutions. This board has full authority and responsibility for policy, development and direction of the research effort. Each researcher receiving a grant has complete freedom to publish the results of his work, whatever the results may be. As of this year, CTR has made grants totalling over 17 million dollars.

In 1964, the tobacco industry made a commitment for additional independent research that now amounts to 18 million dollars. This commitment was made to AMA-ERF, the Education and Research Foundation, which is a research arm of the American Medical Association. The ERF, like the CTR, makes grants for scientific research with complete freedom and autonomy.

#### **What they did**

As of November 1970, the Council for Tobacco Research alone has awarded 396 separate grants to scientists in 189 medical schools, hospitals and institutions in this country and five other countries.

The Education and Research Foundation has awarded 168 grants to scientists in more than 70 medical and research institutions.

The combined commitment by the tobacco industry for those projects presently amounts to over 35 million dollars. In fiscal 1969, for example, the tobacco industry's commitment in this area was more than any government department . . . and millions more than the research expenditure on smoking and health reported for the same period by all the voluntary health associations combined.

#### **What they found**

The findings of research studies funded in whole or in part by CTR have already resulted in publication of 835 scientific papers in professional literature. Those sponsored by the Education and Research Foundation have resulted in the publication of 280 reports.

1115 reports in all. Through this work much valuable data have been produced about lung cancer, heart disease, chronic respiratory ailments and other diseases. However, there's still a lot more to be learned.

#### **The findings are not secret**

All the above reports have been published in medical and scientific journals in the United States and other parts of the world.

These documents are available to scientists and doctors interested in pursuing the scientific truths on the smoking and health issue.

#### **The work should go forward**

There are eminent scientists who believe that the question of smoking and health is an open one and that research in this area must go forward

From the beginning, the tobacco industry has believed that the American people deserve objective, scientific answers.

With this same credo in mind, the tobacco industry stands ready today to make new commitments for additional valid scientific research that offers to shed light on new facets of smoking and health.

These facts and statements are presented by The Tobacco Institute in the belief that the many controversial questions concerning smoking and health must ultimately be answered by further scientific research and new knowledge – and that full, free, and informed public discussion is essential in the public interest.

For further information, we invite you to read  
*"The Cigarette Controversy."* Write to:

[ti  
 Logo]

The Tobacco Institute  
 1776 K Street, N.W.  
 Washington, D.C. 20006

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Appendix K

PLAINTIFF'S EXHIBIT 1325

September 3, 1971

MEMORANDUM

CONFIDENTIAL

TO: Horace R. Kornegay

FROM: William Kloepfer, Jr.

SUBJ: Report on meeting at AMA re ERF tobacco program

According to Dr. Howard, AMA's executive director with whom I met today at Ted Braun's request, AMA is not prepared to make any statement regarding termination of the smoking-health research program, knows of no statement which would not further damage the images of both itself and the tobacco industry, and is under no internal pressure to make any move at this time in the matter.

At nine a.m. today, an hour before our meeting with Howard and the AMA p.r. director, Frank Campion, Braun told me that our purpose in seeing Howard was to notify him that the "executive committee" had rejected a recommendation that surplus ERF tobacco funds be earmarked for "minority group" medical student support.

Braun told me this recommendation had come from Dr. Kernodle, vice-chairman of the AMA (and ERF) board of trustees. He said he recently discussed the entire situation (prior to the last meeting of the TI executive committee) with Howard and Kernodle in a three-way phone conversation. One result of that was, Braun said, that Kernodle was to discuss the whole situation with you prior to the New York meeting.



## CONFIDENTIAL

Howard's response to Braun's notification this morning was that the funds would therefore be used by ERF to continue supporting already approved projects. (The current letter of agreement from the companies to AMA evidently stipulates that in no event are any funds to be returned to the contributors.) As to how much money is at stake: Howard gave Braun a written accounting, which Braun has kept, showing 1) that the residual fund now amounts to \$1.3-odd million and 2) that except for Brown and Williamson, all the participating companies are in arrears on 1970 contributions - in each case a six-figure amount, with RJR the highest at more than \$600,000. Howard said AMA will refund B & W's 1970 payment of some \$270,000 if B & W wishes, from the current \$1.3 million balance.

Howard made it clear that ERF does no research other than that funded by tobacco companies, that there is no basis for and will not be any AMA announcement that it is ending "all its research programs," and that its announcement last year of the closing of its internal research institute has no connection with the present matter. (After the meeting Braun told me that Howard previously said the termination of this program would be in the context of AMA ending "all" research activities; he said Howard has changed his view on this. However, we of the staff have kept very close track of all AMA-ERF reports, and have never seen any indication of research projects other than smoking and health.)

Howard further indicated that if the cigarette companies wish to cancel their current commitment, he would like to have a suitable letter to that effect.

## CONFIDENTIAL

Howard said he regards the program as a great liability - that from AMA's view it has only caused further blackening of AMA's image. He said from the industry's standpoint the research has produced no evidence to clear cigarettes from the generally accepted conclusion that they cause "lung carcinoma" and other maladies. He said he thought the latter point would be widely reported as the reason the industry decided to terminate the program, regardless of what is said by either party about it. Howard also made these points:

1. He is most anxious to avoid any incident which will create displeasure with AMA among tobacco area Congressmen - he said AMA needs their support urgently.
2. He is told that 85% of the ERF research with tobacco funds has been "useful basic research" but that through neglect by all concerned no effort has really been made to impress anyone in or out of AMA with this.
3. There will be a "national meeting in October" of the ERF grantees, similar to those held in San Francisco in 1968 and Scottsdale in 1970, and he does not at this time propose to cancel the meeting. (It has been our understanding that the next meeting of the grantees was to be held in 1972 - it may be that Howard is mistaken about this.)
4. He will inform only Kernodle of this morning's discussion, and Campion will discuss it with no one.
5. He does not now intend to remind the four companies with respect to their arrears.
6. He and Campion, as well as ourselves, should continue to consider what might be done, and what

## CONFIDENTIAL

response might be made if there is any unlikely leak over the current discussions.

/s/ K

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## Appendix L

PLAINTIFF'S EXHIBIT 1105

May 1, 1972

## MEMORANDUM

CONFIDENTIAL

TO: Horace R. Kornegay

FROM: Fred Panzer /s/ FP

SUBJECT: The Roper Proposal

GENERAL COMMENTS

It is my strong belief that we now have an opportunity to take the initiative in the cigarette controversy, and start to turn it around.

For nearly twenty years, this industry has employed a single strategy to defend itself on three major fronts - litigation, politics, and public opinion.

While the strategy was brilliantly conceived and executed over the years helping us win important battles, it is only fair to say that it is not - nor was it intended to be - a vehicle for victory. On the contrary, it has always been a holding strategy, consisting of

- creating doubt about the health charge without actually denying it
- advocating the public's right to smoke, without actually urging them to take up the practice
- encouraging objective scientific research as the only way to resolve the question of health hazard

On the litigation front for which the strategy was designed, it has been successful. While we have not lost a

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liability case, this is not because juries have rejected the anti-smoking arguments.

On the political front, the strategy has helped make possible an orderly retreat. But is fair to say that it has not stemmed the pressure for new legislation, despite the major concessions we have made.

On the public opinion front, however, our situation has deteriorated and will continue to worsen. This erosion will have an adverse effect on the other fronts, because here is where the beliefs, attitudes and actions of judges, juries, elected officials and government employees are formed.

### THE STRATEGIC IMPASSE

As an industry, therefore, we are committed to an ill-defined middle ground which is articulated by variations on the theme that, "the case is not proved." As the recent history of U.S. involvement in Vietnam demonstrated, it is impossible to hold the public on a middle course for any length of time. There seems to be no way that mass public opinion can engage in a controversy and choose an answer that goes beyond the range of either/or.

In the cigarette controversy, the public – especially those who are present and potential supporters (e.g. tobacco state congressmen and heavy smokers) – must perceive, understand, and believe in evidence to sustain their opinions that smoking may not be the causal factor.

As things stand, we supply them with too little in the way of ready-made credible alternatives.

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### THE ALTERNATIVES

Two such credible alternatives exist:

- 1) The Constitutional Hypothesis i.e. people who smoke tend to differ importantly from people who do not, in their heredity, in constitutional makeup, in patterns of life, and in the pressure under which they live.
- 2) The Multi-factorial Hypothesis i.e. as science advances, more and more factors come under suspicion as contributing to the illnesses for which smoking is blamed – air pollution, viruses, food additives, occupational hazards and stresses.

Our 1970 public opinion survey showed that a majority (52%) believed that cigarettes are only one of the many causes of smokers having more illnesses. It also showed that half of the people who believed that smokers have more illness than non-smokers accepted the constitutional hypothesis as the explanation.

Thus, there are millions of people who would be receptive to a new message, stating:

Cigarette smoking may not be the health hazard that the anti-smoking people say it is because other alternatives are at least as probable

The Roper Proposal would be a persuasive (if not strictly scientific) medium for this message, which we have done little to develop in a systematic or comprehensive way.

Following is my outline of the steps required to start a shift in public opinion if the Roper Proposal is accepted.



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A SCENARIO FOR ACTION

1) Select a panel of experts to consult on the design of the study. Ideally they would be prestige figures who would initially have a solid contribution to make and who would also be willing to endorse the study publicly at a later stage.

2) Conduct the pilot study.

3) If favorable, present the results to carefully selected members of the following key groups:

Senate  
House  
Cabinet  
White House  
State Governors  
Medical School and University Presidents  
Scientific bodies

The purpose is two-fold (a) to gain the support and participation of friends and (b) to neutralize any adverse action they may be brewing. For example: By seeing Secretary Butz at this time we might gain some degree of participation from the Agriculture Department. By seeing Secretary Richardson we might possibly forestall a PHS anti-smoking drive.

4) Conduct the full scale survey.

5) If the results are favorable, release them as a book in both hard cover and paper back version, hopefully published by a legitimate house. In effect, such a volume would be a counter - Surgeon General's Report. The principal authors would be Burns Roper and an eminent research scientist. The advisory panel - hopefully broadened as a result of Step 3 - would write the

## CONFIDENTIAL

introduction. The industry's funding role would be fully acknowledged.

6) As a book the material would be marketed and promoted in all the many ways available: magazine condensation, TV and Radio talk shows, newspaper reviews and interviews, advertising, gift distribution, etc. etc.

And best of all, it would only have to be seen - not read - to be believed . . . just like the Surgeon General's report.

FP/kc

cc: M. Kastenbaum  
W. Kloefer, Jr.

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## Appendix M

PLAINTIFF'S EXHIBIT 939

CONFIDENTIAL

*Lorillard*

MEMORANDUM

June 24, 1974

CONFIDENTIAL

TO: Mr. C. H. Judge

FROM: A. W. Spears

Before attempting to discuss CTR, a brief review of the organizations contributing to research into tobacco and health seems to be appropriate. Perhaps the simplest way to review the subject is to list the organizations and/or category of organization and general areas of research which they are pursuing.

1. Harvard Project - effect of smoke on host genetics and lung function; especially, lung defense mechanisms as mediators of bronchitis and emphysema.

2. Washington University - early detection of cancer by immunological methods and function of the immune system in tumor regression and/or prevention.

3. UCLA - macrophage morphology and function differences between smokers and nonsmokers. Cancer immunology, early diagnosis through cell culture methods and cancer chemotherapy.

4. Chemical Companies - development of tobacco substitutes using chemical and bioassay methods to indicate differences from tobacco. Some human experiments relating to bronchitis are being conducted.

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5. Filter Companies - development of filters which alter composition of tobacco smoke. Total particulate reduction, vapor phase reduction and reduction of carbon oxides and oxides of nitrogen.

7. Tobacco Research Council - Harrogate Laboratories have been sold, but research on inhalation and cellular effects of smoke continue under contract. Also, it would appear that some results of Harrogate studies are being pursued directly by individual companies in house. The aim would be highly product orientated.

8. University of Kentucky - broad spectrum of chemical and bioassay development programs. Epidemiology into smoke dose obtained by smokers who enter hospital and those that do not. Primary emphasis seems to be tumorigenesis and chronic pulmonary disease. Program does include agronomical aspects.

9. USDA - program is concentrated on new varieties, curing process, etc. as means of manipulating tobacco. Program utilizes NCI bioassay systems and chemical analysis of smoke.

10. State Agriculture Research - program relates to pesticide residues and breeding for low tar and nicotine.

11. Tobacco Sheet Manufacturers - attempting to make tobacco sheets with improved bioassay results. Utilizing NCI and German Institute for bioassay.

12. NCI and NHLI - programs relate to development of bioassay system for tobacco smoke. Evaluation of

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different products by these bioassay procedures is prime part of program. Emphasis is on tumorigenicity, but programs for cardiovascular disease and chronic pulmonary disease are being initiated.

13. Ad Hoc Committee - most research is epidemiological in nature. Program is primarily aimed at seeking alternate hypothesis of disease causation.

14. CTR - epidemiology, bioassay development, genetics, primarily aimed at tumorigenesis and chronic pulmonary disease, but some activity in cardiovascular disease and smoking motivation

Exclusive of the CTR program, the total annual research funding of the listed organizations is on the order of 25 million dollars directly related to smoking and health. Additionally, the federal government is spending on the order of 700 million in the general disease areas of cancer, chronic pulmonary disease and cardiovascular disease. Clearly, CTR is conducting research in a highly competitive area, and the programs must be well conceived and targeted to avoid unwanted duplication and produce significant results.

Sometime ago (1970), the CTR program was evaluated by the Research Directors. At that time, it was felt that the desired aims of the CTR program could be stated as:

1. To define the effects of cigarette smoke on the human system.
2. To conceptualize and explore other hypotheses relative to the smoking and health question by epidemiological and other appropriate methods.

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3. To define motivational mechanisms of smoking using laboratory animal models as well as human populations.

Following the Harvard funding, B & W suggested that CTR be reorganized and redirected. Their suggestion was basically to expand efforts on the motivational aspects of smoking and to become supportive of Harvard in other areas of research. They also proposed that the scientific director of CTR be supported by an advisory board and specialized staff members. They proposed a working group for overall coordination consisting of Harvard Scientific Directors, CTR Scientific Directors and industry representatives.

From what has been said to this point, it seems obvious that a multitude of research organizations are involved in the area of smoking and health research. Additionally, U.S. sponsored research into the disease areas associated with smoking are two orders of magnitude above industry spending. Previous suggestions for narrower research aims of CTR have been reflected in their recent program, but overall coordination of industry sponsored research has not been achieved. It is also apparent the coordination or at least planning information must be obtained from as many as a dozen organizations if duplication is to be avoided and intelligent planning of short and long range objectives are to be accomplished. Also, it is apparent that numerous organizations are newly involved in chemically and biologically based research toward product modification. The most obvious of these in the U.S. are NCI, the USDA and the The University of Kentucky.



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Historically, the joint industry funded smoking and health research programs have not been selected against specific scientific goals, but rather for various purposes such as public relations, political relations, position for litigation, etc. Thus, it seems obvious that reviews of such programs for scientific relevance and merit in the smoking and health field are not likely to produce high ratings. In general, these programs have provided some buffer to public and political attack of the industry, as well as background for litigious strategy. However, the public and political attitude toward smoking has seriously decayed with respect to the tobacco industry, and scientific and political attack has become intense, with efforts at forced product modification underway. Thus, we see the litigation threat of much lesser importance than that of legislative and public acceptance of cigarette smoking. This suggests that goals should be defined more on the basis of scientific aspects, public relations and the programs leading to such goals coordinated more by business and scientific management.

We see no way to coordinate without an organization and responsibility to coordinate.

The writer believes that only two mechanisms exist for this coordination: (1) a working committee of industry representatives and (2) appointment of one individual for that purpose, with overall program and fiscal responsibility.

In the past, and currently, the Committee approach is in effect being used (Committee of Council). However,

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representative of the Committee generally lack the background to bring about scientific coordination and the time to bring about management coordination.

It is suggested that CTR be combined with the Tobacco Institute administratively, and that an industry committee along with the staff of the Institute and CTR be designated to help define programs. It is further suggested that the programs at Harvard and Washington University be brought under the same committee, and the Scientific Director of CTR. In addition to providing structure for coordination, we believe that more efficient use of information for public relations and legislative activities is to be gained and reductions in administrative and legal fees can be effected.

In looking specifically at the CTR program on a financial basis, as shown below one is struck by the fact that approximately 51% of the budget is associated with cancer related studies. Certainly, one would like an analysis of how much of this work is distinct from the 500 million being expended by NCI and the overall and specific objectives of the CTR research in this area. Another 18% is being expended in the area of lung and pulmonary disease. Again, what are the objectives, and how do they relate to Harvard and all other organizations, particularly Harrogate? Approximately 11% of the budget is associated with cardiovascular research, and of this only 44%, or 5% of the total budget, is directed at arteriosclerosis. Approximately 3.5% of the budget is devoted to motivational research, and 5.6% in epidemiology covering the three major disease areas. A miscellaneous category appears to be generally supportive of the other activities, and represents 11% of the budget.

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From a review of the individual projects under the cancer heading, one can reasonably describe the experimental objectives.

1. Investigate the factors, AHH, immune competence, strain, viral infection, Vitamin A, etc. as mediators of the carcinogenic response to chemicals in the small animals.
2. Develop hardware and facilities for long term chronic smoke inhalation studies with a tumorigenic end point.
3. Determine tumorigenic activity of smoke fractions.
4. Determine if reported environmental carcinogens interact with tobacco smoke.
5. Develop new short term bioassay systems for carcinogenesis.

A review of the individual projects under lung and pulmonary studies indicates that the objectives are diffuse compared to cancer.

1. Determine effect of smoke by chronic inhalation in mice.
  2. Explore various facets of lung metabolism, defense mechanisms, etc.
- 

## Appendix N

PLAINTIFF'S EXHIBIT 1708

12/10/74

True WorkingStrategy RecommendationI. Introduction

True, the first popular, Super Hi-Fi cigarette, had been gaining sales at a decreasing rate during the two years prior to 1974. In 1974, the brand has levelled off, and will lose share leadership of the Super Hi-Fi category for the first time since its introduction.

This document will present a working strategy recommendation for the communications direction which it is believed will be most efficacious in reversing the recent trend in True's sales. It is based upon an extensive review of the following data:

- The Switching Study
- True Group Sessions
- Maxwell Reports
- Competitive Advertising Review
- The Expert Panel Report

II. Who Are The Potential True Smokers?

Demographically, they are upscale in both income and education. 61% of them are women.

The real key however lies in certain psychographic characteristics which transcend demographics, brand characteristics and even cigarette categories, and tend to make a smoker "True Prone". It is to this psychological core running across brand and category definitions that we must direct our True communications.

We are talking of people who for the most part are currently smoking either a Hi-Fi, or a Lo-Fi cigarette. They are probably on the verge of a conscious decision regarding smoking. They are seriously considering switching to a Super Hi-Fi cigarette. Although this attitude may be generated by any number of reasons, three of the key ones are:

- They really want to quit smoking and can't and feel that SHF is a "way station".
- They have tangible signs (such as morning cough) that their current brand of cigarette could be harming their health.
- They seek a compromise between quitting and continuing with their current brand. They see a Super Hi-Fi brand as one which will enable them to continue smoking and live with themselves.

Some of these smokers will look for the taste benefits of their current brand in the Super Hi-Fi category. A high percentage of them will go to XXXXXXXXXXXX\* (the latter two appear not to be fully perceived as Super Hi-Fi cigarettes. And, indeed, are not advertised as Super Hi-Fi's).

The Smokers we are interested in are different. Their overriding concerns are health and the desire to quit smoking. This combination generates a sacrificial behavior pattern which makes it impossible for this group to accept a full flavor, Super Hi-Fi cigarette. To draw a comparison, the True prone group may be seen as the "Listerine" users of the cigarette market, due to their obvious sacrifice of taste for health. They see True as a healthy cigarette and the proof of this is in it's lack of taste. (This comparison has strategic implications for True inasmuch as it could pre-empt XXXXXXXXXXXX\* in the Tar & Nicotine area and prove extremely competitive to that segment of

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\*Material redacted as is original exhibit.

the XXXXXXXXXXXX\* franchise not concerned with taste). They are opinionated smokers who place great emphasis on the "modern" and/or scientific.

As a group they are lighter smokers than the XXXX-XXXXXX\* prone group due to:

- The skew toward women.
- The desire to quit smoking entirely.

### III. Communications Objective

To pinpoint and attract the True prone smoker with an effective communications program without alienating the current True franchise.

### IV. Strategy

A. To touch the emotional and/or intellectual pressure points associated with the decision to move to True. For example:

- The decision to quit smoking.
- The True brand as a compromise that the concerned smoker can live with.

B. To recognize the dichotomy of the Super Hi-Fi category in terms of the following segments:

- Taste Brands

• XXXXXXXXXXXX\*

• XXXXXXXXXXXX

• XXXXXXXXXXXX\*

(which although not totally perceived as Super Hi-Fi brands are categorized here for strategic purposes)

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\* Material redacted as is original exhibit.



- Health Brands

- True
- XXXXXXXXXXXX\* (which may have something of a taste image)
- XXXXXXXXXXXX\*

By designing our communications to appeal to those characteristics of smokers who are prone to enter the health segment of the Super Hi-Fi market.

- C. To recognize that the bulk of new consumers will come from the Hi-Fi and Lo-Fi segments of the market.
- D. To present a candid, forthright image of True which portrays the brand exactly as it is and does not over-promise in terms of flavor benefits.

V. Support

- A. The sales position of True vis-a-vis the Super Hi-Fi category is supported by the Maxwell Reports over the past three years.
- B. Demographically, the True prone smoker is quite similar to the current True smoker (see attachment I for detailed comparison). The key differences are in the younger and more even geographic skews of the True prone smoker versus the current True smoker.
- C. The fact that True prone smokers are currently in Hi-Fi and Lo-Fi categories is supported by:
  - The switching study which showed that:
    - XXXXXXXXXXXX\* is the single largest brand source for True (4 out of 10 defectors go to True). XXXXXXXXXXXX\* Previous smokers represent 15% of True's franchise.

\* Material redacted as is original exhibit.

- 50% of True's total franchise came from the lo-fi category.
- 2/3 of True's gains in the last two years have come from lo-fi.
- Although the switching study does not show movement from XXXXXXXXXXXX\* to True the demographic profile of the XXXXXXXXXXXX\* smoker is similar to that of the True smoker, suggesting possible potential.
- One of four True prone smokers currently smokes a hi-fi brand vs. one of six XXXX-XXXXXX\* prone smokers.
- The size of the segments (Hi-Fi and Lo-Fi) make them a necessary target for a brand seeking to increase volume.
- The Hi-Fi category has lost share over the last 5 years (13.4% to 12.1%) on a steady annual basis indicating an inherent vulnerability, especially in light of the dramatic growth (+140%) posted by the Super Hi-Fi category over the same period.
- XXXXXXXXXXXX\* has a weak growth pattern over the last three years.
- D. While not universally projectable, the group sessions seem to indicate that the Super Hi-Fi decision is a conscious one, based upon the reasons mentioned earlier. They go on to point out that to a great extent people who move to True punish themselves through their conscious disavowal of taste.
- E. The demographic profiles of True vs. XXXX-XXXXXX\* indicate a dichotomous Super Hi-Fi market, with True having great appeal to

\* Material redacted as is original exhibit.

upscale woman, residing in the urban centers of the Northeast and the West Coast, and XXXXXXXXXXXX\* being masculine, and geographically oriented toward the traditionally strong XXXXXXXXXXXX\* areas in the South.

The group sessions tend to support this view of two Super Hi-Fi categories with respondents categorizing XXXXXXXXXXXX\* as a taste brand, (while this seems contradictory to the incentives reported in the switching study, perhaps the split between low T&N and flavor so pronounced in True prone consumers does not effect XXXXXXXXXXXX\* smokers the same way. In addition, almost twice as many XXXXXXXXXXXX\* smokers claim taste as their reason for smoking than do True smokers) and XXXXXXXXXXXX\* primarily as line extensions of full flavored cigarettes. True, XXXXXXXXXXXX\* are seen as "health" categories.

The expert panel data indicates the low taste level of True vis-a-vis an assortment of cigarettes.

- F. Yankelovich Data suggests that the current True smoker is less likely to desire a "natural" lifestyle. He looks for the convenience of the modern world, and tends to rely upon the scientific. Translated to smoking terms he accepts the reduced flavor level of True as part of the scientific advance of reducing tar and nicotine, and since he has no desire for a natural (full flavor) smoke has little problem accepting the "artificial" flavor of True.

\* Material redacted as is original exhibit.

# Attachment I

## True Vs. True Prone Demographics

*Purchase for (illegible) &/or substitute\**

Sex	True Smoker	True Prone Smoker
Male	37	39
Female	63	61
Age		
21-34	36	49✓*
35-49	34	27
50+	29	24
Income		
Under \$7,500	12	16
\$7,500 - \$14,999	31	36
\$15,000+	33	31
Education		
Some High School	10	15✓*
Finished High School	39	33
Any College	49	52
Geographics		
East	37	27
Central	23	28
South	21	27
West	20	18
Ethnicity		
White	93	92
Black	1	7
Other	2	1
Occupation		
Blue Collar	15.7	15
White Collar	42.7	49

\* Handwritten notes on original.

*Appendix O*

PLAINTIFF'S EXHIBIT 2745

PHILIP MORRIS U.S.A.

INTER-OFFICE CORRESPONDENCE

100 Park Avenue, New York, N.Y. 10017

Date: March 24, 1981

**CONFIDENTIAL**

To: • Mr. H. Cullman/Mr. J.C. Bowling  
 From: • J. J. Morgan

Subject: •

At a meeting yesterday with Burson Marsteller attended by Kloefer, Ave and myself, a decision was reached to present the following draft statement to the full Communications Committee at our meeting of March 31 for review for submission to the Executive Committee at their meeting of April 8/9:

"The Communications Committee is committed to instituting national advertising to reinforce the smoker, his choice to smoke and the custom of smoking.

This will be accomplished by:

- attacking bad research
- attacking researchers themselves, where vulnerable
- attacking the unreasonableness of legislative segregation
- exposing the bureaucracy and personal aggrandizement of certain anti-smoking organizations.

In effect, the Communications Committee is readying advertising to stand up to the industry's detractors and by that means support our smoking population."

While the final language of this statement might change, I think you will sense a direction which is a straight line out of our meeting last Thursday. Ave indicated to me that Judge and Stevens as well as Horrigan are thinking this way.

/s/ J

JJM/mm

cc: S. P. Pollack  
 T. F. Ahrensfield  
 A. Holtzman



*Appendix P*

PLAINTIFF'S EXHIBIT 2935

THE NEW YORK TIMES, MONDAY, JANUARY 30, 1984

© 1984 R.J. REYNOLDS TOBACCO

## Can we have an open debate about smoking?

The issues that surround smoking are so complex, and so emotional, it's hard to debate them objectively.

In fact, many of you probably believe there is nothing to debate.

Over the years, you've heard so many negative reports about smoking and health – and so little to challenge these reports – that you may assume the case against smoking is closed.

But this is far from the truth.

Studies which conclude that smoking causes disease have regularly ignored significant evidence to the contrary. These scientific findings come from research completely independent of the tobacco industry.

We at R.J. Reynolds think you will find such evidence very interesting. Because we think reasonable people who analyze it may come to see this issue not as a closed case, but as an open controversy.

We know some of you may be suspicious of what we'll say, simply because we're a cigarette company.

We know some of you may question our motives.

But we also know that by keeping silent, we've contributed to this climate of doubt and distrust. We may also have created the mistaken impression that we have nothing to say on these issues.

That is why we've decided to speak out now, and why we intend to continue speaking out in the future.

During the coming months we will discuss a number of key questions relating to smoking and health. We will also explore other important issues including relations between smokers and non-smokers, smoking among our youth, and "passive smoking."

Some of the things we say may surprise you. Even the fact that we say them may prove controversial.

But we won't shy away from the controversy because, quite frankly, that's our whole point.

We don't say there are no questions about smoking. Just the opposite. We say there are lots of questions – but, as yet, no simple answers.

Like any controversy, this one has more than one side. We hope the debate will be an open one.

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## Appendix Q

## PLAINTIFF'S EXHIBIT 964

## C.T.R. Meeting\*

Yeaman, Gardner, Hockett, Stevens, Judge

Yeaman To give us cash-flow analysis comparing commitments vs. payout.

1. Fixed
2. Anticipated extensions or renewals which may or may not occur.
3. Moral obligations — or "fact of life"
3. [sic] See page 3
4. Fractionization studies in the main.
5. For March & Sept submissions to S.A.B.

Quality of Investigators and the work done has improved dramatically because:

1. Targeted research
2. Availability of federal funds down so tobacco money ain't so dirty any more.

Good research generates good research.

Yeaman Difficulty in justifying budget incr — "We're trying to prove a negative"

"CTR is best & cheapest insurance the tobacco industry can buy and without it the Industry would have to invent CTR or would be dead."

\* Entire document is handwritten notes.

Take out if required:

- |             |   |  |
|-------------|---|--|
|             | ) | 1.) Chem compounds in whole smoke.       |
|             | ) | CONTRACT. 12 fractions which abett       |
|             | ) | known carcinogus in cancer formats       |
|             | ) |  |
|             | ) | One of the fractions is a cancer inhibi- |
| \$360,000 I | ) | tor.                                     |
| 220,000 II  | ) |  |
|             | ) | How many cigarettes to produce a sig-    |
|             | ) | nificant amount of the compound.         |
|             | ) |  |
|             | ) | Others doing this kind of work — (e.g.,  |
|             | ) | Polarium)                                |
|             | ) |  |
|             | ) | We'd better know more about smoke        |
|             | ) | components than anyone else.             |

## Study on

- Children of smoking parents — respiratory infec-
- tions.
- Pregnant mothers
- Nicotine collection sites — STRESS

## #3. explanation

- ➡ McLeavin (Colo) \$165M mice
- related Reid \$120M pulmonary — outstanding
- ➡ Coumpacker (Colo-Sweden) \$195M twins
- Kaiser-Permarieute \$ 90M twins
- Boise \$ 8.5M

*Appendix R***Background on . . .****Tobacco and Health Research**

**The subject of smoking and health continues to make news. Charges against tobacco have been widely publicized, but less attention is given to the views of those who do not accept these charges.**

Tobacco has been the subject of broad criticism, and extravagant praise, throughout its history.

In the past few years there has been considerable attention to tobacco, especially cigarettes, because of charges that smoking was actually causing certain diseases, especially lung cancer. The charges were based on statistical association studies, which spurred a great deal of research to learn more about the causes of the diseases in question, and to determine whether smoking was involved.

Recently revived interest in tobacco and health may have given the impression that something new has been discovered to implicate tobacco. This is a misleading impression.

Actually "Much research reported in the past few years has tended to weaken, rather than to support, the hypothesis that cigarette smoking is a causative factor in lung cancer."

That is the report of Dr. Clarence Cook Little, a cancer researcher for 54 years and former Managing Director of what is now the American Cancer Society. Dr. Little is the Scientific Director of the Tobacco Industry

Research Committee, which awards research grants to independent scientists who conduct their own research and publish their own findings, with no strings attached.

The tobacco industry recognizes that it has a special responsibility to help scientists determine the facts about tobacco and health. The industry has shown its determination to do so by providing financial support to the T.I.R.C., and by turning over full control of the T.I.R.C.'s research program to a Scientific Advisory Board composed of experienced doctors and scientists.

We believe that research alone will provide the answers to the health problems of our nation. Until research does provide the answers, the industry has an obligation to the millions who enjoy tobacco products and to those who depend on tobacco for their livelihood to keep the record straight.

*Here are some facts about the situation:*

Scientists in various parts of the world have been conducting intensive studies on the possible effects of tobacco on human health. Many important, relevant clinical and laboratory studies do not support those who say tobacco is a cause of lung cancer or heart disease.

The most notable thing about research into lung cancer and heart disease is that new scientific findings keep broadening the range of suspects that must be studied.

In lung cancer research, scientists are producing increasing evidence that viruses may play a role. Other scientists cite previous lung infections, particularly tuberculosis, as having a connection. Environment is another major area. Studies show that lung cancer rates vary



widely between urban and rural areas, between cities of similar size and area, and between different countries – and these variations do not conform to smoking patterns. Other factors are also being studied, including heredity and nutritional deficiencies.

In heart research, scientists are looking into the effect of stress and strain, lack of exercise, heredity, diet, hormonal differences, tobacco use and many other possibilities. It is worth noting that heart disease is the leading cause of death among non-smokers, as well as among smokers.

**This does not mean that smoking does not need further study. It does show that singling out tobacco is not an accurate reflection of overall research findings.**

Those who believe tobacco is responsible for various ailments still rely largely on statistical association studies. Much clinical and laboratory research done in recent years has not substantiated this belief. The statistical association studies have come in for much critical analysis as to their meaning. Most biostatisticians agree that association studies do not prove cause and effect.

The urgent need today is for sound research to determine the facts about our health problems, which are admittedly different since more people are living longer. (The average lifespan in America has increased from 54.1 years in 1920 to 69.7 years in 1959. Most lung cancer cases occur after age 55.)

The major problems of concern are the origins of cancer and heart disease. Studies of tobacco should be continued, along with studies of other suspects. However, caution is needed in evaluating suggestions or

claims that this or that single factor is the culprit. Acceptance of simplified answers may only obscure the real state of knowledge and perhaps delay or divert the research necessary to find the real answers.

*The current status of lung cancer research, as it relates to questions concerning tobacco and health, will be reviewed in greater detail tomorrow.*

## ***The Support of Research By the Tobacco Industry***

Since 1954, tobacco growers, auction warehousemen and manufacturers have been supporting the Tobacco Industry Research Committee's program of independent research into all aspects of tobacco use and health.

Research policy and program is determined by a Scientific Advisory Board of nine noted doctors, scientists and educators. They are authorities in their respective fields and maintain their affiliations with their own institutions. These men develop the research policy, determine areas of research interests and award grants-in-aid for research by independent scientists. Funds are appropriated by the Committee as needed by the Board.

Chairman of the Advisory Board is Dr. Kenneth Merrill Lynch, Chancellor of the Medical College of the University of South Carolina.

The Scientific Director of the T.I.R.C. is Dr. Clarence Cook Little, world-renowned cancer researcher and for 16 years the managing director of what is now the American Cancer Society. Dr. Little is former president of the Universities of Main and Michigan, and the founder of the Roscoe B. Jackson Memorial Laboratory in Bar Harbor, Maine.

Since the start of the program, over 500 research grants and renewals have been made by the Advisory Board to more than 80 scientists in universities, hospitals and other research institutions, including the following universities: California, Chicago, Harvard, Johns Hopkins, Maryland, Michigan, Texas, Virginia. Some 275 scientific papers have been published that credit T.I.R.C. for support in whole or part.

Issued by:

**Tobacco Industry  
Research  
Committee**

*150 East Forty-Second Street,  
New York 17, N.Y.*

Endorsed by:

**The Tobacco  
Institute, Inc.**

*808 Seventeenth Street,  
N. W.,  
Washington 6, D.C.*

whose combined membership includes the following:

The American Snuff Company The American Tobacco Company, Inc. The Bloch Brothers Tobacco Company Bright Belt Warehouse Association Brown & Williamson Tobacco Corporation Burley Auction Warehouse Association Burley Tobacco Growers Cooperative Association Burley Stabilization Corporation G. A. Georgopulo & Co., Inc. George W. Helme Company Imperial Tobacco Company, Ltd. Larus & Brother Company, Inc. Lieberman Tobacco Company Liggett & Myers Tobacco Company P. Lorillard Company, Inc. Maryland Tobacco Growers Association Philip Morris, Inc. R. J. Reynolds Tobacco Company Peter J. Schweitzer, Inc. Scotten, Dillon Company Stephano Brothers, Inc. Tobacco Associates, Inc. United States Tobacco Company

*Appendix S*

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**PORZIO, BROMBERG & NEWMAN**

A Professional Corporation

163 Madison Avenue

Morristown, N.J. 07960

(201) 538-4006

Attorneys for Plaintiff Antonio Cipollone

-----x	
ANTONIO CIPOLLONE,	: UNITED STATES
individually, and as	: DISTRICT COURT
Executor of the Estate of	: FOR THE DISTRICT OF
Rose D. Cipollone,	: NEW JERSEY
	:
Plaintiff,	: HON. H. LEE SAROKIN
	:
vs.	:
LIGGETT GROUP, INC., a	: DOCKET NO.
Delaware Corporation;	: 83-2864 SA
PHILIP MORRIS	:
INCORPORATED, a Virginia	: THIRD AMENDED
Corporation, and LOEW'S	: COMPLAINT AND
THEATRES INC., a New	: DEMAND FOR
York Corporation,	: TRIAL BY JURY
	:
Defendants.	:
	:
-----x	

Antonio Cipollone individually, and as Executor of the Estate of Rose D. Cipollone, residing at 96 Berlotto Avenue in the town of Little Ferry, County of Bergen, State of New Jersey, by way of Complaint against the defendants says:

## FIRST COUNT

1. Plaintiff is a citizen of the State of New Jersey, and is the widower of the decedent, Rose D. Cipollone.
2. The decedent, Rose D. Cipollone, resided in New Jersey from 1960 until her death in October, 1984.
3. Defendant Liggett Group, Inc. is a corporation, incorporated under the laws of the State of Delaware and has its principal place of business in a state other than New Jersey.
4. Defendant Philip Morris Incorporated is a corporation, incorporated under the laws of the State of Virginia and has its principal place of business in a state other than New Jersey.
5. Defendant Loew's Theatres Inc. is a corporation, incorporated under the laws of the State of New York and has its principal place of business in a state other than New Jersey.
6. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$10,000.00.
7. This court has original jurisdiction over the within matter under 28 U.S.C. §1332(a)(1).

## SECOND COUNT

1. From approximately 1942 through 1982 defendant Liggett Group Incorporated individually and/or its predecessor in interest, hereafter referred to as "LIGGETT GROUP, INC.," was in the business of manufacturing and selling Chesterfield cigarettes and L & M cigarettes and placed them in the stream of commerce.

2. From approximately 1942 through 1982 defendant Philip Morris Incorporated individually and/or its predecessors in interest, hereafter referred to as "PHILIP MORRIS, INCORPORATED" was in the business of manufacturing and selling Virginia Slims cigarettes and Parliament cigarettes and placed them in the stream of commerce.
3. From approximately 1942 through 1982 defendant Loew's Theatres Inc. individually and/or its predecessors, hereafter referred to as "LOEW'S THEATRES INC.," was in the business of manufacturing and selling True cigarettes and placed them in the stream of commerce.
4. From approximately 1942 through 1955 Rose D. Cipollone purchased and smoked Chesterfield cigarettes.
5. From approximately 1955 through 1968 Rose D. Cipollone purchased and smoked L & M cigarettes.
6. From approximately 1968 through 1972 Rose D. Cipollone purchased and smoked Virginia Slims cigarettes.
7. From approximately 1972 through 1974 Rose D. Cipollone purchased and smoked Parliament cigarettes.
8. From approximately 1974 through 1982 Rose D. Cipollone purchased and smoked True cigarettes.
9. The cigarettes manufactured and sold by defendants LIGGETT GROUP, INC., PHILIP MORRIS INCORPORATED, and LOEW'S THEATRES INC. presented a risk to the plaintiff's decedent far greater than any social utility.



10. The cigarettes manufactured and sold by the defendants LIGGETT GROUP, INC., PHILIP MORRIS INCORPORATED, and LOEW'S THEATRES INC. and purchased and used by Rose D. Cipollone, were in an unsafe and defective condition.

11. The cigarettes manufactured and sold by the defendants LIGGETT GROUP, INC., PHILIP MORRIS INCORPORATED, and LOEW'S THEATRES INC. were purchased by Rose D. Cipollone without substantial change in the condition in which they were manufactured and sold by said defendants.

12. As a direct and proximate result of the use of defendants, LIGGETT GROUP, INC.'s, PHILIP MORRIS INCORPORATED's, and LOEW'S THEATRES INC.'s defective products, Rose D. Cipollone, developed bronchogenic carcinoma and other personal injuries, which caused her to endure great pain and suffering, to be unable to attend to her usual occupation and activities, to expend monies for medical care, to sustain other losses thereby, and which caused her death on October 21, 1984.

WHEREFORE, plaintiff, Antonio Cipollone, hereby demands damages against defendants, LIGGETT GROUP, INC., PHILIP MORRIS INCORPORATED, and LOEW'S THEATRES INC. individually, jointly and in the alternative, together with interest and costs of suit.

#### THIRD COUNT

1. Plaintiff, Antonio Cipollone repeats each and every allegation contained in the First and Second Counts of this Complaint as if set forth fully herein.

2. The cigarettes manufactured and sold by defendants LIGGETT GROUP, INC., PHILIP MORRIS INCORPORATED, and LOEW'S THEATRES INC. were defective as a result of said defendants' failure to provide adequate warnings of the health consequences of cigarette smoking.

3. As a direct and proximate result of the use of defendants, LIGGETT GROUP, INC.'s, PHILIP MORRIS INCORPORATED's, and LOEW'S THEATRES INC.'s defective products, Rose D. Cipollone developed bronchogenic carcinoma and other personal injuries, which caused her to endure great pain and suffering, to be unable to attend to her usual occupation and activities, to expend monies for medical care, to sustain other losses thereby, and which caused her death on October 21, 1984.

WHEREFORE, plaintiff, Antonio Cipollone hereby demands damages against defendants, LIGGETT GROUP, INC., PHILIP MORRIS INCORPORATED, and LOEW'S THEATRES INC. individually, jointly and in the alternative, together with interest and costs of suit.

#### FOURTH COUNT

1. Plaintiff, Antonio Cipollone repeats each and every allegation contained in the First, Second and Third Counts of this Complaint as if set forth fully herein.

2. During all times relevant hereto, defendants, LIGGETT GROUP, INC., PHILIP MORRIS INCORPORATED, and LOEW'S THEATRES INC. knew or should have known that the inhalation of cigarette smoke by the

plaintiff could result in cancer, heart disease and other adverse health consequences.

3. The defendants, LIGGETT GROUP, INC., PHILIP MORRIS INCORPORATED, and LOEW'S THEATRES INC. were negligent in the manner they tested, researched, sold, promoted and advertised the cigarettes which said defendants manufactured and sold.

4. The defendants LIGGETT GROUP, INC., PHILIP MORRIS INCORPORATED, and LOEW'S THEATRES INC. were negligent in failing to adequately warn of the health consequences of cigarette smoking.

5. As a direct and proximate result of the use of defendants, LIGGETT GROUP, INC.'s, PHILIP MORRIS INCORPORATED's, and LOEW'S THEATRES INC.'s defective products, Rose D. Cipollone, developed bronchogenic carcinoma and other personal injuries, which caused her to endure great pain and suffering, to be unable to attend to her usual occupation and activities, to expend monies for medical care, to sustain other losses thereby, and which caused her death on October 21, 1984.

WHEREFORE, plaintiff, Antonio Cipollone hereby demands damages against defendant, LIGGETT GROUP, INC., PHILIP MORRIS INCORPORATED, and LOEW'S THEATRES INC. together with interest and costs of suit.

#### FIFTH COUNT

1. Plaintiff Antonio Cipollone repeats each and every allegation contained in the Counts of the Complaint as if set forth fully herein.

2. As a direct and proximate result of defendant LIGGETT GROUP, INC.'s, PHILIP MORRIS INCORPORATED's, and LOEW'S THEATRES INC.'s negligence in the manner in which they advertised their cigarette products, the warnings that were given regarding the adverse health effects of smoking were neutralized and rendered ineffective.

3. As a direct and proximate result of the use of defendants, LIGGETT GROUP, INC.'s, PHILIP MORRIS INCORPORATED's, and LOEW'S THEATRES INC.'s defective products, Rose D. Cipollone, developed bronchogenic carcinoma and other personal injuries, which caused her to endure great pain and suffering, to be unable to attend to her usual occupation and activities, to expend monies for medical care, to sustain other losses thereby, and which caused her death on October 21, 1984.

WHEREFORE, plaintiff, Antonio Cipollone hereby demands damages against defendant, LIGGETT GROUP INC., PHILIP MORRIS INCORPORATED, and LOEW'S THEATRES INC. together with interest and costs of suit.

#### SIXTH COUNT

1. Plaintiff Antonio Cipollone repeats each and every allegation contained in the Counts of the Complaint as if set forth fully herein.

2. The defendants, LIGGETT GROUP, INC., PHILIP MORRIS INCORPORATED, and LOEW'S THEATRES INC. individually and as members of the tobacco industry, intentionally, wilfully and wantonly, through their advertising, attempted to neutralize the warnings that

were given regarding the adverse affects of cigarette smoking.

3. As a direct and proximate result of the use of defendants, LIGGETT GROUP, INC.'s, PHILIP MORRIS INCORPORATED's, and LOEW'S THEATRES INC.'s defective products, Rose D. Cipollone, developed bronchogenic carcinoma and other personal injuries, which caused her to endure great pain and suffering, to be unable to attend to her usual occupation and activities, to expend monies for medical care, to sustain other losses thereby, and which caused her death on October 21, 1984.

WHEREFORE, plaintiff, Antonio Cipollone hereby demands punitive damages against defendants, LIGGETT GROUP, INC., PHILIP MORRIS INCORPORATED, and LOEW'S THEATRES INC. together with interest and costs of suit.

#### SEVENTH COUNT

1. Plaintiff Antonio Cipollone repeats each and every count contained in all Counts of this Complaint as if set forth, fully herein.

2. Defendants LIGGETT GROUP, INC., PHILIP MORRIS INCORPORATED, and LOEW'S THEATRES INC. expressly warranted that smoking the cigarettes which they manufactured and sold did not present any significant health consequences.

3. As a direct and proximate result of the use of defendants, LIGGETT GROUP, INC.'s, PHILIP MORRIS INCORPORATED's, and LOEW'S THEATRES INC.'s

defective products, Rose D. Cipollone, developed bronchogenic carcinoma and other personal injuries, which caused her to endure great pain and suffering, to be unable to attend to her usual occupation and activities, to expend monies for medical care, to sustain other losses thereby, and which caused her death on October 21, 1984.

WHEREFORE, plaintiff, Antonio Cipollone hereby demands damages against defendant, LIGGETT GROUP, INC., PHILIP MORRIS INCORPORATED, and LOEW'S THEATRES, INC. together with interest and costs of suit.

#### EIGHTH COUNT

1. Plaintiff, Antonio Cipollone repeats each and every allegation contained in all Counts of this Complaint as if set forth fully herein.

2. The defendants, LIGGETT GROUP, INC., PHILIP MORRIS INCORPORATED, and LOEW'S THEATRES INC. individually and as members of the tobacco industry were or should have been, at all times relevant hereto, in possession of medical and scientific data which indicated that the use of its cigarettes were hazardous to the health of consumers, but, prompted by pecuniary motives, the defendants, LIGGETT GROUP, INC., PHILIP MORRIS INCORPORATED, and LOEW'S THEATRES INC. individually and as members of the tobacco industry ignored and failed to act upon said medical and scientific data and conspired to deprive the public, and particularly the consumers of the defendants' products, of said medical and scientific data.



3. As a direct and proximate result of the use of defendants, LIGGETT GROUP, INC.'s, PHILIP MORRIS INCORPORATED's, and LOEW'S THEATRES INC.'s defective products, Rose D. Cipollone, developed bronchogenic carcinoma and other personal injuries, which caused her to endure great pain and suffering, to be unable to attend to her usual occupation and activities, to expend monies for medical care, to sustain other losses thereby, and which caused her death on October 21, 1984.

WHEREFORE, plaintiff, Antonio Cipollone hereby demands punitive damages against defendants, LIGGETT GROUP, INC., PHILIP MORRIS INCORPORATED, AND LOEW'S THEATRES INC. together with interest and costs of suit.

#### NINTH COUNT

1. Plaintiff Antonio Cipollone repeats each and every allegation in all Counts of the Complaint as if set forth fully herein.

2. The cigarettes manufactured and sold by defendants LIGGETT GROUP INC., PHILIP MORRIS INCORPORATED, and LOEW'S THEATRES INC. were defective as a result of the cigarettes causing addiction and dependency and therefore rendering any warning meaningless.

3. As a direct and proximate result of the use of defendants, LIGGETT GROUP, INC.'s, PHILIP MORRIS INCORPORATED's, and LOEW'S THEATRES INC.'s defective products, Rose D. Cipollone, developed bronchogenic carcinoma and other personal injuries, which caused her to endure great pain and suffering, to be

unable to attend to her usual occupation and activities, to expend monies for medical care to sustain other losses thereby, and which caused her death on October 21, 1984.

WHEREFORE, plaintiff, Antonio Cipollone hereby demands damages against defendant, LIGGETT GROUP, INC., PHILIP MORRIS INCORPORATED, and LOEW'S THEATRES INC. together with interest and costs of suit.

#### TENTH COUNT

1. Plaintiff Antonio Cipollone repeats each and every allegation contained in all Counts of the Complaint as if set forth fully herein.

2. LOEW'S THEATRES INC. is the successor in interest to Lorillard Corporation.

WHEREFORE, plaintiff, Antonio Cipollone hereby demands damages against defendant LOEW'S THEATRES INC., together with interest and costs of suit.

#### ELEVENTH COUNT

1. Plaintiff Antonio Cipollone repeats each and every allegation contained in all Counts of the Complaint as if set forth fully herein.

2. PHILIP MORRIS INCORPORATED is the successor in interest to Benson & Hedges.

WHEREFORE, plaintiff, Antonio Cipollone hereby demands damages against defendant PHILIP MORRIS INCORPORATED, together with interest and costs of suit.

## TWELFTH COUNT

1. Plaintiff Antonio Cipollone repeats each and every allegation contained in all Counts of the Complaint as if set forth fully herein.

2. LIGGETT GROUP INC. is the successor in interest to Liggett & Meyers Inc. and Liggett and Meyers Tobacco Co.

WHEREFORE, plaintiff, Antonio Cipollone hereby demands damages against defendant LIGGETT GROUP INC., together with interest and costs of suit.

## THIRTEENTH COUNT

1. Plaintiff, Antonio Cipollone repeats each and every allegation contained in all Counts of this Complaint as if set forth fully herein.

2. Antonio Cipollone, at all times relevant hereto was the husband of Rose D. Cipollone.

3. As a direct and proximate result of the use of defendants, LIGGETT GROUP, INC.'s, PHILIP MORRIS INCORPORATED's, and LOEW'S THEATRES INC.'s defective products, Rose D. Cipollone, developed bronchogenic carcinoma and other personal injuries, which caused her to endure great pain and suffering, to be unable to attend to her usual occupation and activities, to expend monies for medical care, to sustain other losses thereby, and which caused her death on October 21, 1984.

4. As a direct and proximate result of the negligence of the defendants LIGGETT GROUP INC., PHILIP MORRIS INCORPORATED, and LOEW'S THEATRES

INC., and the defective condition of defendant's products, as set forth in this Complaint, Rose D. Cipollone left surviving her as her heir Antonio Cipollone, who sustained pecuniary losses resulting from the death of Rose D. Cipollone, and incurred hospital, medical and funeral expenses for the deceased.

WHEREFORE, the plaintiff, Antonio Cipollone, hereby demands damages against the defendants, LIGGETT GROUP, INC., PHILIP MORRIS INCORPORATED, and LOEW'S THEATRES INC. together with interest and costs of suit.

## FOURTEENTH COUNT

1. Plaintiff, Antonio Cipollone repeats each and every allegation contained in all Counts of this complaint as if set forth fully herein.

2. Antonio Cipollone, at all times relevant hereto was the husband of Rose D. Cipollone.

3. As a direct and proximate result of the use of defendants, LIGGETT GROUP, INC.'s, PHILIP MORRIS INCORPORATED's, and LOEW'S THEATRES INC.'s defective products, Rose D. Cipollone, developed bronchogenic carcinoma and other personal injuries, which caused her to endure great pain and suffering, to be unable to attend to her usual occupation and activities, to expend monies for medical care, to sustain other losses thereby, and which caused her death on October 21, 1984.

4. Antonio Cipollone witnessed the pain, agony and suffering of his wife, Rose D. Cipollone, through her

illness and treatment and up through the date of her death, and suffered personally thereby.

WHEREFORE, the plaintiff, Antonio Cipollone, hereby demands damages against the defendants, LIGGETT GROUP, INC., PHILIP MORRIS INCORPORATED, and LOEW'S THEATRES INC. together with interest and costs of suit.

Plaintiff hereby demands a trial by jury on all issues.

PORZIO, BROMBERG  
& NEWMAN, P.C.  
Attorneys for plaintiff,  
Antonio Cipollone

By /s/ Marc Z. Edell  
Marc Z. Edell  
An Attorney of the Firm

Dated: 5/30/85

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*Appendix T*

EXCERPTS OF TRAIL TESTIMONY

\* \* \*

*Harris-cross*

[p. 1594] Q Now, Dr. Harris, let's go back to 1952.

In 1952 - excuse me, 1953, I believe you testified that an article appeared in the New England Journal of [p. 1595] Medicine.

Do you remember that?

A Yes.

Q And you testified about that during your direct testimony. And you referred to the fact that in 1953, this article in the New England Journal of Medicine, the editors stated that the situation affords unusual opportunities for the tobacco - vast tobacco industry to support impartial research into the effects that their products may have on human health, right?

A Right.

Q That is an editorial that appeared in 1953 in the New England Journal?

A That's correct.

Q The editors also made some other statements in this article about cigarette smoking and whether it causes lung cancer, did it not?

A That's correct.

Q Would you read to the jury, if you can see it? Can you see it from here?

A No.

Q I'll hold it up a little closer.



Can you see it now?

A Yes.

Q Would you read the sentence that begins "It is true [p. 1596] that"?

A "It is true that the causative mechanism underlying the association between tobacco and lung cancer is not known, although there is ample room for speculation in the presence of known carcinogens in tobacco tar. Also, little is known about the dosage filtration [sic] of smoke and other factors that bear on the subject. However, if control of cholera had not been initiated empirically, but had awaited demonstration of the vibrio, which is the bacterium for cholera, active and useful preventive measures would have been delayed 50 years."

Q And then the editorial goes on to recommend that the tobacco industry do research?

A Impartial research into the effects that their products have on human health, may have on human health.

Q And isn't it a fact, Dr. Harris, that one year after this article appeared in the New England Journal of Medicine, certain members of the tobacco industry created an organization called the Tobacco Industry Research Committee?

A Yes, that's one of the publically funded research organizations that I talked about last week.

Q And the Tobacco Industry Research Committee was later called the Council for Tobacco Research?

A That's right, the CTR, which I mentioned in the letter from Dr. Spears to Mr. Judge.

[p. 1597] Q Now, when you were testifying last week, Mr. Edell was questioning you, you made reference to a document that I think has been received in evidence as plaintiff's exhibit 4901, entitled "A Frank Statement to Smokers"?

A Yes.

Q Do you remember that?

A Yes, I do.

Q And you quoted certain language from that document.

Do you remember that?

A Mr. Edell directed my attention to one sentence and asked me my opinion concerning that sentence.

Q He didn't direct your attention to any of the other sentences in that document though, did he?

A No.

I do remember talking about the fact that this statement was precipitated, in my opinion, in large part by Wynder's finding concerning production of cancer in animals and although this statement, which appeared in the January 4th, 1954 New York Times, does not say the word "Wynder," it does make, if I recall correctly, make reference to the animal tests.

Q Now, would you answer the question I asked you, which is: That you only quoted the language that Mr. Edell asked you to quote from this document. Is that right?

*Harris-cross*

A I didn't quote anything, I just responded to his [p. 1598] question.

Q In fact, you know that this document, P-4901, is the document by which certain members of the tobacco industry announced the creation of the tobacco industry research committee. Isn't that right?

A That's correct. I don't know of any other document that specifically describes the creation of this TIRC.

Q But you didn't tell the jury that last week when you were testifying, did you?

A Yes, I did.

Q Did you tell the jury that in this document the members of the tobacco industry who issued this statement said, "Many people have asked us what we are going to do to meet the public concern aroused by the recent reports," you didn't tell the jury that, did you?

A I can't see it from here, but I would certainly want the jury to read the whole.

Q I'll ask you if you would read the paragraph that begins, "Many people have asked us what we are going to do," and the three things that the tobacco industry members said they were going to do.

A "Many people have asked us what we are doing to meet the public concern aroused by the recent reports. Here is the answer: One, we are pledging aid and assistance to the research effort into all phases of tobacco use and health. [p. 1599] This joint financial aid will, of course, be in addition [sic] what is already being contributed by individual companies.

*Harris-cross*

"Two, for this reason we are establishing a joint industry group consisting initially of the undersigned. This group will be known as the Tobacco Industry Research Committee.

"Three, in charge of the research activities of the company committee will be a scientist of unimpeachable integrity and national reputation. In addition, there will be an advisory board of scientists disinterested in the cigarette industry. A group of distinguished men from medicine, science and education will be invited to serve on this board. These scientists will advise the committee on its research activities."

Q Now, this advertisement appeared in the New York Times on February - January 4, 1954, right?

A Right.

Q And, in fact, these individual members didn't create and form the Tobacco Industry Research Committee?

A Yes, they did.

Q Now, you referred to a statement that appeared in this document last week in which these individual companies said, "We believe the products we make are not injurious to health."

Do you remember that?

[p. 1600] A Yes, I do.

Q Do you remember what cigarette was being smoked by Mrs. Cipollone in 1954?

A Chesterfield.

*Harris-cross*

Q And Chesterfield is made by Liggett?

A That's correct.

Q And Liggett is not one of the companies that formed this committee or made this statement. Isn't that correct?

A No, they stayed out of that.

Q They were not members of the this organization. Isn't that right?

A That's right.

Q But it is their cigarette that Mrs. Cipollone was smoking in 1954?

A That's correct.

Q They were not smoking cigarettes manufactured either by Philip Morris or by Lorillard in 1954 when this statement was publically issued?

A No, Mrs. Cipollone was not smoking.

Q Mrs. Cipollone was not smoking products made by Philip Morris or Lorillard in 1954, when this statement was issued?

A No. She was smoking this one, Liggett & Myers.

Q Chesterfield.

Now, you know that, in fact, the Tobacco Industry Research Committee and the Council for Tobacco Research did [p. 1601] conduct smoking and health studies, did they not?

A Yes. Some studies were pertinent to smoking and health.

*Harris-cross*

Q Did I ask you that, whether they were pertinent?

A You asked me if there were smoking and health studies.

Q Did I ask you whether they were pertinent?

A Yes.

Q I did?

A Yes.

Q Which ones were pertinent and which ones weren't pertinent. Strike that.

Let me ask you first, how many studies has the Tobacco Industry Research Committee and its successor, Council for Tobacco Research, conducted or funded, sponsored since 1954?

A I don't know. I'm sure it's dozens of investigators.

Q Do you have any idea how many?

A If you were to include any study whatsoever, I'm sure it would be dozens, if not hundreds.

Q And how many of them have you read?

A I've read summaries of a great deal of them, but I have certainly not read all of them and I can't tell you how many.

Q Have you read anything other than summaries of any of the studies that have been funded by CTR and TCR [sic]?

A One of the sets of studies in the papers by Dr. [p. 1602] Homburger in which -



*Harris-cross*

Q Answer the question, Dr. Harris.

How many of them have you read in their entirety?

A I don't know.

Q One?

A Oh, no. A number of them.

Q How many, ten percent?

A When I read the papers, I don't always check to see who paid for the -

Q So the answer is, you don't know how many of them you read?

A I can just give you examples of papers I read within the last year that I believe were sponsored by this organization that is now called the CTR.

Q And to your knowledge, the Council for Tobacco Research continues, to this date, to fund research on smoking and health?

A Correct.

\* \* \*

[p. 1895] Q Dr. Harris, you testified on your direct examination about TIRC, which later became CTR.

Do you remember that testimony?

A Yes, Tobacco Industry Research Committee, which in 1964 was called CTR, Council for Tobacco Research.

Q Mr. Edell had you read some of the language to the jury.

*Harris-cross*

Do you remember that?

A Yeah. There was a specific line. I can't read it now, but it would be on the lefthand side.

Q And then Mr. Bleakley yesterday had you read other portions of this document to the jury.

Do you remember that?

A Yes, I do.

[p. 1896] Q And I believe that is one, two and three, "Many people have asked us what we are doing to meet the public's concern aroused by the recent reports."

Here's the answer.

And then there are three things.

Do you remember that when Mr. Bleakley asked you to do that?

A Yes.

Q One of those, number three, says, "In charge of the research activities of the committee will be a scientist of unimpeachable integrity and national repute. In addition, there will be an advisory board of scientists, disinterested in the cigarette industry. A group of distinguished men from medicine, science and education will be invited to serve on this board. These scientists will advise the committee on its research activities."

Do you remember reading that to the jury yesterday?

A Yes, I do.

Q Dr. Harris, who is Clarence Cook Little?

*Harris-cross*

A Clarence Cook Little was a geneticist.

THE WITNESS: I'll have some water, too.

MR. PARRISH: Make that two.

THE WITNESS: May I continue?

I'll wait.

Q Please, go ahead.

[p. 1897] Clarence Cook Little was a geneticist. He first was president of, I think, the University of Michigan.

If we go back to the twenties when he was involved in the eugenics movement, in the 20's there was a movement where a number of social reformers got together with scientists and they were talking about reading a human race and everything like that.

I think some of the scientists thought it was carried away and dropped out of it, but he was originally from the eugenics movement. He was interested in genetics and heredity.

He then became interested as a biological scientist and developed a laboratory in Bar Harbor, Maine in which he was one of the people to inbred [sic] strains of animals like mice, so they would be genetically the same, because in the late 30's and early 40s, there was a new idea when we tested mice they should all be related to each other. Shouldn't be all different.

Then he stayed basically as a scientist doing research in that area in Bar Harbor up in Maine, until and continuing through his retirement, during which time - I missed something - in the 1940's he was also the executive

*Harris-cross*

director of the American Society of Cancer Control while he was also a laboratory scientist in Maine.

Q Doctor, the American Society for Cancer Control was that [p. 1898] what later became the American Cancer Society?

A Right.

Q And Dr. Little was president of that?

A There was a big breakup in '49 and Mary Lasiker basically got rid of everybody including Dr. Little and changed the name to the American Cancer Society.

Q And Dr. Little was someone who was known throughout the country as a highly-qualified scientist of the highest credentials; isn't that true?

A He was a well-regarded scientist, correct.

Q He was, in fact, the gentleman who became the head of the tobacco industry research committee, the scientist?

A Correct. He was in retirement at the time and came out of retirement to do that.

Q Paragraph one says, We are pledging aid and an assistance to the research efforts into all phases of tobacco use and health. This joint financial aid will, of course, be in addition to what is already being contributed by individual companies.

Do you remember reading that to the jury yesterday?

A Yes, I remember reading it, yes.

Q Can you see that okay, doctor?

*Harris-cross*

A Yes. Well, the reporter is in the way. I could step down.

Q Let me move it a little.

[p. 1899] Isn't it true that through 1986 almost 600 different scientists had been funded by grants from the Council by Tobacco Research?

A I wouldn't be able to verify the numbers independently.

Q Almost a thousand number of grants from the Council for Tobacco Research, with over 3,000 articles being published as a result of those grants, isn't that true?

A I wouldn't be able to check it independently. I don't know.

Q Isn't it also true, Dr. Harris that somewhere between 120 and 130 million dollars has been granted by TIRC and CTR over the years?

A I wouldn't be able to check it independently. I don't know.

Not right now I couldn't check it.

\* \* \*

*Homberger-cross*

[p. 2730] Q Let me - I'm going to be asking you a number of questions. I have a bit of a cold and with the noise outside, if you have any difficulty hearing or understanding my questions, please let me know and either the reporter can read it back or I'll rephrase it.

First, I'd like to review with you your history with the Tobacco Industry Research Committee, which was

*Homberger-cross*

subsequently renamed Council for Tobacco Research. I'll refer it to as the Council for Tobacco Research, if that's all right?

A Sure.

Q Your first grant from the Council for Tobacco Research was in 1954 or 1955. Isn't that correct?

A That's approximately correct. Yes, I don't recall the exact date.

[p. 2731] Q You were one of the very early grantees. Isn't that correct?

A Oh, yes. I might even have been the first because I was a friend of Dr. Little.

Q At all times, until about 1969, you had grants from the Council for Tobacco Research. Isn't that correct?

A I think we had grants through 1973.

Q Grants that later became contracts. Isn't that true?

A At some point it was changed into a contract.

Q And you would submit grant proposals to the scientific advisory board and the Council for Tobacco Research would decide whether or not to fund them. Isn't that correct?

A Right, that's correct.

Q And the work you asked to have funded by the CTR was all significant and important research, wasn't it?

A I think so.



*Homberger-cross*

Q And the work you had funded by the Council for Tobacco Research all related to smoking and health. Isn't that correct?

A Indirectly, yes. It was all biological work on animals, smoking and responses of animals.

Q So it all related to smoking and health?

A Yes, yes.

Q And all the various grant proposals that you had presented and had funded by the CTR had scientific merit, [p. 2732] didn't they?

A I believe so.

Q And in your opinion, doctor, this is the type of work that an organization like the Council for Tobacco Research should have been doing. Isn't that correct?

MR. EDELL: Objection, your Honor, that calls for an expert opinion. I don't think he can turn this witness into an expert for him to testify with regard to the overall practices of the Council for Tobacco Research.

THE COURT: Sustained.

Q During this period of time, Doctor Clarence Cook Little was the scientific director of the CTR during the time you were getting your grant work. Isn't that correct?

A During most of the time, yes.

Q You had known him for a long time, you testified?

A Yes.

*Homberger-cross*

Q He had an excellent reputation in the scientific community, didn't he?

A Yes.

Q And his reputation was for both as an excellent scientist and a man of great integrity. Isn't that correct?

A Yes.

\* \* \*

*J.F. Cullman-cross*

[p. 3434] Q Now, at the time that you became chief executive at Philip Morris in 1957, would you describe for the Court and jury the sort of atmosphere of publicity about smoking and health that was present?

A In '57?

Q '57?

A I would say it was already very bad. We had been through the Reader's Digest story. There was several stories in the Reader's Digest, Cancers by the Carton is one that comes to mind immediately. We already received the Doll and Hill statistical study from England. We received the Earle Wynder Graham Studies. We received a great range of studies, many of them sponsored by the Cancer Society, others by other organizations. So the question of smoking and health was already very much on our minds at that time.

MR. BLEAKLEY: Excuse me a moment, your Honor. Could I get a copy of the exhibit?

[p. 3435] MR. EDELL: Certainly. It's in the back room. I will get it.

*J.F. Cullman-cross*

A In furtherance to the question -

MR. BLEAKLEY: Wait till Mr. Edell comes back.

MR. EDELL: I will be right back.

There is a stand over there if you need it.

MR. BLEAKLEY: Thank you.

Q Mr. Cullman, do you want to complete -

A I want to say the statement we looked at yesterday, the ad came out in early January of 1954, which indicates even in the middle 50's and before I was actually with Philip Morris, the industry was considering taking major steps to try to mount research, get some answers, and do the best possible job we could in funding independent, impartial research, and that statement was really, it said, we were going to do it.

I mean the actual TIRC was - was not in effect till sometime in mid-1954.

MR. BLEAKLEY: Your Honor, this exhibit has been used a number of times but there is language that was not previously read to the jury which I would like to call to their attention.

THE COURT: You may.

MR. BLEAKLEY: I don't know whether you will be able to see it but I will read it: This is the Tobacco [p. 3436] Industry Research Committee, Plaintiff's Exhibit 4901, an ad in The New York Times, Monday January 4, 1954.

Many people have asked us what we are going to do - what we are doing to meet the public's concern aroused

*J.F. Cullman-cross*

by the recent reports. Here is the answer. One: We are pledging aid and assistance to the research effort into all phases of tobacco use and health. This joint financial aid will, of course, be in addition to what has already been contributed by individual companies.

Two: For this purpose we are establishing a joint industry group consisting initially of the undersigned. This group will be known as the Tobacco Industry Research Committee.

Three: In charge of the research activities of the committee will be a scientist of unimblemishable integrity and national repute. There will be an advisory board of scientists disinterested in the cigarette industry.

A group of distinguished men from science and education will be invited to serve on this board. These scientists will advise the committee on its research committees. This statement is being issued because we believe the people know where we stand on it and what we intend to do about it.

Q Mr. Cullman, who was the first scientific director?

A I believe it was Clarence Cook Little.

[p. 3437] Q Who was that?

A He was - president of two universities, and I think it was Maine and Michigan, and he had been a member of the American Cancer Society Board. He was a highly regarded individual, unquestioned credentials just as we said in the ad.

\* \* \*

*Cohen-cross*

[p. 5077] Q Now, you next testified about a category of information that you said was relevant in supporting your opinion concerning whether consumers and Rose Cipollone had an [p. 5078] adequate understanding of the nature and extent of the health consequences of smoking prior to 1966 and that was the information that you read that had been provided to you by Mr. Edell that came from the files of the defendants and the tobacco industry?

A I read boxes and boxes of documents, that's right.

Q That were provided to you by Mr. Edell in this case?

A Of course.

Q And you said in your testimony that statements by the tobacco companies that they were going to do research into smoking and health in 1954 was one of the things that affected your opinion, right?

A That's right, yes.

Q In 1954, when the tobacco industry announced the formation of the Tobacco Industry Research Committee, your testimony is that that is part of your support, part of the support for your opinion that Mrs. Cipollone did not have an adequate understanding?

A Well, I don't know that I was talking about Mrs. Cipollone when I made that statement. I think I was talking about the information environment.

*Cohen-cross*

And I think what I had said was that providing that information to consumers in full page or very large newspaper advertisement would reassure people that the tobacco industry was doing everything it possibly could to [p. 5079] investigate whether there might be a link between smoking and various health problems. And the article asserted that at this point they didn't believe there was such a link.

Q Now, accepting my representation to you that Dr. Harris testified in this case that it had not in 1954 been proven that cigarette smoking causes cancer, you're not suggesting there is anything wrong with the tobacco industry forming the Tobacco Industry Research Committee in 1954, are you?

A I wouldn't object to them forming the Tobacco Industry Research Committee ever.

Q At any point in time?

A At any point in time.

Q And conducting research?

A Absolutely not. I think it's a wonderful idea.

\* \* \*

*Schuman-cross*

[p. 5898] Q Doctor, let's review the involvement of the tobacco companies and the tobacco industry with the Surgeon [p. 5899] General's Advisory Committee.

You talked about the fact that the Tobacco Institute, I believe you said, was in a position to suggest members of the committee?

A That's right.



*Schuman-cross*

Q And they were in a position to veto members, I think you told us?

A Correct.

Q Do you know whether or not they suggested anyone?

A I don't know that.

Q Do you know whether or not they vetoed anyone?

A I wouldn't know who they vetoed. It was just our understanding that out of the final batch, and I don't even know how many down to out of the 150 that had been named, who had been the category of veto and/or those who had begged off serving on the Committee.

Q So you really don't know -

A I don't know.

Q - whether they cast a veto, whether others cast a veto?

A That's right, I do not know.

Q Now, there is a section in the 1964 Surgeon General's Report labeled acknowledgements. Isn't that true?

MR. NORTHRIP: I believe it's page 17 in the jury binder that Mr. Edell provided.

THE COURT: Do you want the jury to turn to it?

[p. 5900] MR. NORTHRIP: Yes.

THE COURT: The jury may turn to page 17.

*Schuman-cross*

Q Doctor, I don't have my report with me, so I really can't tell you - perhaps I can. I believe that's Roman IV in the Surgeon General's advisory -

A That's correct. I have that page.

Q And the committee. - and that's the Surgeon General's Advisory Committee. I'm looking at the last sentence before the acknowledgements start.

The Committee did acknowledge with gratitude and deep appreciation the substantial cooperation and assistance of the following?

A Correct. I read that, sir.

Q And following that there are a number of names of individuals and organizations. Isn't that true?

A Correct.

Q And the list includes Lorilliard Company, P. Lorilliard I believe it's listed, a successor corporation, Philip Morris?

A Would you please?

Q Sure. The list includes a number of tobacco companies, does it not?

A It includes a number of what? I'm not catching that word, I'm sorry.

Q The list includes a company named P. Lorilliard, a predecessor of Lorilliard Company?

[p. 5901] A Under what heading? Is it alphabetical here? See the names of the individuals are alphabetic.

*Schuman-cross*

Q I believe the organizations had fitted in alphabetically as well?

A Okay.

Q That would be on page Roman 1523 in the jury binder.

A And it's X V, Roman 15 in my copy, here. Okay. P. Lorilliard Company, New York.

Q And it also includes Philip Morris on the same page?

A Correct.

Q And it includes Liggett & Myers?

A Correct, on the previous page.

Q And those are the defendants in this lawsuit. Are you aware of that?

A Yes, I'm aware of that.

Q And the list also includes the American Tobacco Company, Brown & Williamson Tobacco Corporation?

A Correct. American, I find.

What was the last one?

Q Brown & Williamson?

A Correct.

Q R. J. Reynolds Tobacco Company?

A Now, that would be under R. Yes, I see that, too.

Q Those are the major cigarette manufacturers. Isn't that correct?

*Schuman-cross*

[p. 5902] A I would guess so, yes.

Q And you don't know, doctor, what these particular companies did to cooperate with and assist the Surgeon General's Advisory Committee?

A No, that is correct, I don't know their specific activities.

Q And that was because contacts with the tobacco industry were handled by Dr. Peter Hamill?

A Correct.

Q And he was the medical coordinator of the committee. Isn't that correct?

A Correct.

Q And James Hundley, the Deputy Surgeon General under Dr. Terry?

A Correct.

Q Doctor, that list also includes Dr. Clarence Cook Little, does it not, the scientific director of the Tobacco Industry Research Committee?

A I note that also, yes.

Q And that organization was later renamed the Council for Tobacco Research?

A Right.

Q And includes doctor Robert C. Hockett, associate scientific director of the TIRC as well. Isn't that true?

A Dr. Robert who?

*Schuman-cross*

[p. 5903] Q Dr. Robert C. Hockett, associate scientific director of the Tobacco Industry Research -

A Hockett, yes, I see that.

Q Now, Dr. Schuman, you never met or dealt with Dr. Little or Dr. Hockett or any other representative of the TIRC?

A Yeah, I did not.

Q Dr. Peter Hamill, the medical coordinator of your committee, met with the TIRC representatives. Isn't that correct?

A I would say to the extent that they are mentioned in the minutes of our meetings. I recall that this was mentioned and Peter Hamill was responsible for those minutes at the time, the early deliberation of the company.

Q And Dr. Hamill is an epidemiologist like yourself. Isn't that correct?

A Correct.

Q And you consider him a solid citizen in your field?

A Yes, I have considered him such.

Q And do you still today?

A I do.

Q And Dr. Hamill was the person who initially contacted you on behalf of plaintiffs about participating in this lawsuit. Isn't that correct?

*Schuman-cross*

A That's correct.

Q And he met with you and with plaintiffs' counsel on one [p. 5904] of the occasions, at least, when you were preparing for your depositions?

A Yes, met with him at his home.

Q And you have had an opportunity to review Dr. Hamill's deposition taken in this case. Isn't that correct?

A I had his - I don't know how many deposition days he submitted, but I remember seeing two volumes, I presume they were the two days of his first deposition or the two days of his deposition, if he had not been followed after that.

Q You did get a chance to read the first two days?

A Yes, yes, I did.

Q And do you recall that he testified that the Tobacco Industry Research Committee cooperated fully with the Surgeon General's Advisory Committee in every area?

A I remember that.

Q And in your estimation, Dr. Schuman, Dr. Clarence Cook Little, the scientific director of the Tobacco Industry Research Committee was considered one of the true giants in biological science. Isn't that correct?

A That name was so offered to me over the years, yes.

Q And in Dr. Hamill's opinion and he expressed it in his deposition, Dr. Little was the soul of integrity. Isn't that true?



*Schuman-cross*

A It's his opinion. I would have nothing to judge that or base that on myself.

\* \* \*

*Deposition of Domenica Cilento*

[p. 6309] Q Did you ever hear the term coffin?

A Oh, yes. Let me put another nail in my coffin or something like that.

Q When did you -

A Way back.

Q When you say "way back," how far back?

A Way back. I think I always heard it.

Q Since you first started smoking; isn't that fair to say?

A Oh, yeah.

MR. PARRISH: Your Honor, I have an objection to the question beginning on 57, line 20, continuing to 50, line 6.

THE COURT: I will sustain the objection.

MR. EDELL: Picking up Page 58, line 13.

Q Are you aware today of what Antonio Cipollone's attitude is about cigarette smoking?

A He doesn't like it.

Q When did you first became [sic] aware that Antonio did not like cigarette smoking?

A I think as long as I know him. He has an allergy or something.

*Deposition of Domenica Cilento*

Q You know him since prior to the time he married Rose?

[p. 6310] A Yes.

Q Did Rose ever discuss with you Antonio's feeling about her smoking?

A No.

Q Did she ever tell you that, he is always badgering me about not smoking?

A Yes. Because he always badgered everybody who smoked.

\* \* \*

[p. 6355] Q Am I correct that your father passed away in 1940?

A 1940.

Q Could you tell me what the cause of his death was?

A Cerebral hemorrhage.

Q And he was a smoker. Is that right?

A Yes, sir.

Q Was there any discussion around the time of his death about the effect of the cigarette smoking on his health that you can recall?

A Oh, mama used to yell at him. We were young. Every time -

Q 1940 you were about eighteen years old. Is that right?

*Deposition of Domenica Cilento*

A Seventeen.

Q Seventeen. You were saying - sorry. Go ahead.

A Mama used to yell at him for smoking because every time he lit, he coughed.

Q Would you say he had a chronic cough?

A Yes. He had a chronic cough.

Q Do you recall your mother lecturing him to stop smoking because of his cough?

A Yes, yes.

Q Would it be fair to say at that time you associated your father's smoking with his cough?

A I don't know if I did.

[p. 6356] Q But you recall your mother making that association. Is that right?

A Yes.

Q Did your mother ever urge you not to smoke?

A Always.

Q And did she urge Mrs. Cipollone, by that I mean the plaintiff, Rose Cipollone, in this case not to smoke?

A Always. My mother never liked it.

Q She also urged your father prior to 1940 not to smoke or cut down. Is that right?

A Yes.

\* \* \*

*T. Cipollone-cross*

[p. 6379] Q Mr. Cipollone, I believe you said that you lived with your mother and father until about July or August of 1982. Is that right?

A Yes.

Q That is when you moved to California?

A Yes.

Q And up till that time you continuously lived at home with your parents?

A (No response).

Q And you recall that during the time you were living at home, there were periods when your mother and father talked about cigarette smoking. Right?

A Yes.

Q And I think you told us at your deposition that many times your father told your mother that he didn't believe it was good for her to smoke?

A Yes.

Q Sometimes he would say bafuma, which I take it is Italian for cigarettes?

A I think that is what it means.

Q He told her it was no good for her and she shouldn't smoke?

A Yes.

[p. 6380] Q Right?

A Yes.

*T. Cipollone-cross*

Q And I think you also told us at your deposition that there were times when your mother would light a cigarette and your father would complain and say, You shouldn't smoke. Why are you going to kill yourself? Do you remember that?

A I think so.

Q And there were times when family members, your aunts and your uncles would come to the house for a card game?

A Yes.

Q Some of them were smokers?

A Yes.

Q When she would light up, your father would complain and say, Why are you going to smoke? You all are going to kill yourselves? Do you remember that?

A Yes.

Q And I believe you also told us at your deposition, Mr. Cipollone, to your knowledge your mother never tried to quit smoking?

A Yes.

Q Nobody told you that she ever tried to quit?

A No.

Q And you have no personal knowledge of your mother ever trying to put down on her smoking?

A No personal knowledge of it.

\* \* \*

*T. Cipollone-cross*

[p. 6389] Q As I understand it, there came a time in 1975 that Dr. Lowy advised you to stop smoking?

A Yes.

Q And then you did stop smoking. Correct?

A Yes.

Q And you knew Dr. Lowy was treating your mother at approximately that same time, '73, '74, '75?

A Yes.

Q I believe you told us at the deposition that you told [p. 6390] your mother that Dr. Lowy had told you to stop smoking and that is why you were stopping smoking?

A That was part of the reason.

Q Your mother was the type of a person, I believe you told us on deposition, that took care of her health. She went for frequent medical examinations to take care of herself?

A Yes.

\* \* \*

*Deposition of Rose Cipollone*

[p. 7051] Q Do you recall any message in Chesterfield ads other than cigarettes being mild?

A I don't remember.

Q And that is during the entire period of time you were smoking Chesterfield?

A I think it was just Chesterfield.



*Deposition of Rose Cipollone*

Q Sorry?

A Just Chesterfield.

Q You don't remember any other message?

A No, I don't remember.

\* \* \*

[p. 7062] Q Then did he make other arguments as time went on?

A Yes, sir.

Q When did he make those other arguments?

A Constantly.

Q What would he say?

A Please stop smoking.

Q What reason did he give?

A Said it was bad for my health.

Q When did he start saying it was bath [sic] for your health?

A All along.

Q You mean all along starting in 1947?

A Sure.

Q Did he get my more specific as to why it was bad for your health?

A Oh, yes, sure.

Q What would he say?

*Deposition of Rose Cipollone*

A Well, when they started with some of the findings on T.V. he would note them and tell them to me about the Surgeon General and smoking was bad for your health and smoking caused heart disease and cancer, et cetera. He would always bring it to my attention.

Q But starting back even in 1947, did I understand your testimony to be that he was telling you smoking was bad for your health?

[p. 7063] A He didn't tell me that it caused cancer or heart disease, but he said it was not good for you, that was his expression.

Q When did he start telling you about the findings that he saw on T.V. that cigarette smoking might cause cancer or heart disease?

A I don't recall the date.

Q Would it have been as early as 1950?

A I don't recall.

Q You don't have any idea when he started telling you that it might cause cancer?

A No, sir.

Q As soon as reports started?

MR. PARRISH: You don't have to read it.

MR. EDELL: Sorry.

MR. PARRISH: That is our designation. You don't have to read it, on page 79.

MR. EDELL: Continuing onto page 80.

*Deposition of Rose Cipollone*

MR. PARRISH: Excuse me. I am sorry. Just give me a minute.

Sorry. We do want it read. 156.

Q As soon as reports started appearing on T.V. and on the radio that cigarette smoking being associated with heart disease and cancer did your husband start talking to you about them?

[p. 7064] A Yes, sir.

Q And he started urging you to quit because of that?

A Yes, sir.

Q When did you first try to quite [sic] smoking?

A When I became pregnant with my first child.

Q You never tried to quit before that date?

A No.

Q You never tried to cut down before that date?

A No.

Q When you tried to quit when you became pregnant with your first child why did you make that attempt?

A My husband begged me to. He said don't smoke while you are pregnant and I was very young, I was 21, I was going to be a mother and I was all excited and I thought oh, I'm going to be so good I will not smoke and endanger my child or myself and of course every once in a while, I would sneak a cigarette. It was very hard. I tried hard and I did well for that period.

*Deposition of Rose Cipollone*

Q For that period, how much would you judge you smoked?

A I couldn't really tell you because every now and then I would steal a cigarette from my sister. I would buy a pack and hide it. When my husband wasn't around I would take one. I didn't smoke too much but I didn't give it up altogether.

Q How many cigarettes would you judge you were smoking a [p. 7065] day during this period?

A I really couldn't tell you because if my husband was around I couldn't smoke at all.

Q How did you consider that you were endangering your child?

A I didn't consider it really. I just thought I was being so marvelous and so good.

Q I guess I would ask you again, if it would refresh your recollection, when you said before that you didn't want to endanger your child, can you tell me what you were talking about by the way of an endangerment to your child?

A Well, I went to a very old doctor. He was very elderly. He had delivered my brother and I think he had delivered my younger sister and I went to him. He was about 80 years old. He was still practicing. I think they had the discussion with my husband. My husband said, you know, doctor, she smokes.

Q Were you present?

A Yes, I was.

*Deposition of Rose Cipollone*

I was on the examining table and the doctor was there were [sic] my husband. And he was a very old doctor, and he said to my husband something to the effect that my husband said, oh, you know, she smokes and the doctor said oh, you don't want to smoke when you are pregnant, something like that, and then my husband would nudge me and nudge me and I [p. 7066] said I'll stop, all right. I was very young, 21. I thought wow, a miracle, I am going to have a baby. You try to be so proper and good.

Q What were you referring to when you said endanger yourself?

A I guess it was the same thing.

Q You were concerned that cigarettes would in some way harm you?

A You want to know the truth, I wasn't concerned. They were concerned. My husband hated it. I told you that at the beginning. He would try anything to make me stop.

Q Did your stopping cause you to be nervous or irritable?

A No. I would sneak a cigarette once in a while.

\* \* \*

[p. 7079] Q How long did you smoke Chesterfield?

A I smoked Chesterfields I think until they came out with L&M, with a filter cigarette.

Q Can you tell us approximately when that would have been?

*Deposition of Rose Cipollone*

A I really don't recall the year. I know that I did switched [sic] to the filter cigarettes.

Q Why did you make that switch?

A Well, they were talking about the filter tip, that it was milder and a miracle it would keep the stuff inside a trap, whatever.

Q When you say "the stuff," what are you referring to?

A Nicotine, the brown stuff.

Q Why did you desire the filter tip?

A Because it was the new thing and I figured, well, go along.

Q Any other reason for switching to L&M?

A I figured it was better.

Q In what respect?

A The bad stuff would stay in the filter then.

Q Why did you consider that bad stuff?

A Because they used to advertise like that, they used to show that the tip, the filter, that nicotine and the tars would go through the filter.

Q Why were you concerned about the nicotine and tars?

[p. 7080] A I didn't think it was good.

Q You didn't think it was good?

A That's right.



*Deposition of Rose Cipollone*

Q Was it because of your concern about your health?

A Not really.

Q What was the concern?

A I don't know. It was the trend. Everybody was smoking the filter cigarettes and I changed, too.

\* \* \*

[p. 7110] Q Did you ever make any other attempt to quit smoking?

A Yes, I did.

Q When would that have been?

A I believe that was in the middle '60s or so.

Q So from 1947 until the middle '60s, you never made any other attempt to quit smoking?

[p. 7111] A No, I didn't.

Q Did you ever try to cut down during that period of time?

A Sometimes, not successfully.

Q What would prompt you to try to cut down and when, if you can tell me?

A Well, Tony was always after me to stop smoking, he really was. Then there were articles about tests that they were doing with monkeys and that smoking was no good for the lungs and it caused diseases, heart disease, cancer, emphysema.

*Deposition of Rose Cipollone*

MR. SILFEN: Your Honor, next portion, same objection.

THE COURT: From where to where?

MR. SILFEN: Page 276, 13 through 277, three, more or less.

THE COURT: Let me read it, please.

Overruled. I'll permit it.

Q Can you be more specific?

A There were newspaper articles, there were TV articles, there were radio articles.

And, of course, I told you that Antonio always used to draw my attention if he saw something in the paper or heard something.

Of course, I didn't want to believe that because it was very hard to quit and I figured, how true can it be if [p. 7112] they strapped a monkey 24 hours to a machine? Of course he was going to get something. And I figured I'm not strapped to a machine and the Government was there and there was no real proof. Tobacco companies wouldn't do anything that was going to kill you, as I figured, so I figured until they proved it to me, until they proved it to me to be real, I didn't take it seriously. I'm being every honest with you. Maybe I didn't want to believe it.

Q When your husband would point these articles out to you, did you read them?

A I tell you, not in front of him I wouldn't. I wouldn't give him the satisfaction, but I did read them and I did listen. But when he was around he would draw

*Deposition of Rose Cipollone*

my attention and I would make excuses to leave the room or I'd say, yes, I don't want to hear that. And that's that.

Q What period of time are we talking about when you would see these kinds of articles?

A This is, I'll say, through the middle '60s and '70s and until I got the cancer.

Q Did you read articles prior to the middle '60s?

A I don't really recall. I don't recall.

Q If there were articles?

A If there were an article, Tony would have drawn my attention to it, believe me.

Q And you would have read them?

[p. 7113] A And I would have made believe I didn't read them.

Q And, in fact, would have?

A Of course.

Q Or if they had appeared in articles in magazines that you normally read?

A Sure, I would read them. I wouldn't tell him.

Q Could you tell me some of the magazines that you subscribed to that had articles of this type?

A There were articles in the a lot of magazines. I couldn't specify. There were so many magazines that came in and out of my house. There were magazines in the beauty parlor. All the magazines that I previously mentioned, some of them had articles. In fact, lots of

*Deposition of Rose Cipollone*

them had articles. As the years went by you saw more and more articles and more on TV and more tests and you saw more monkeys and whatever.

Q What motivated you? Was it these articles that motivated you to try to cut down on your smoking?

A I was coughing, I was starting to cough and I used to have a pain that was like on the rightside of my neck. I don't know if it came from my neck down or from here up, but I was coughing.

And I tell you the truth, I was making novinas I was so scared sometimes that I was getting sick and I used to make all kinds of promises to God if he didn't let me have cancer that I wouldn't do this and I wouldn't do that. [p. 7114] But I never kept the promise and that's terrible, but I'm confessing it here.

MR. EDELL: Beginning at line 570, 2 through 575, ten. We don't believe that it's appropriate for completeness, your Honor.

THE COURT: You're not reading it at some later date - later time?

MR. EDELL: That's correct.

THE COURT: Your position, Mr. Parrish.

MR. PARRISH: We'll read that part in our case.

THE COURT: All right. Thank you.

That is through?

MR. EDELL: Line ten on page 159.

THE COURT: Thank you.

*Deposition of Rose Cipollone*

Q You had a pain in your neck around that time?

THE READER: I am sorry. What line?

MR. EDELL: 159, line 11.

A In my throat.

Q In your throat?

A Yes.

Q You associated that with smoking; didn't you?

A I thought it was a little irritated, yes.

Q You got a little scared?

A Yes, very.

Q And went to church?

[p. 7115] A Yes.

Q You are a religious person you told us?

A Not too much.

Q But you went to church?

A Yes.

Q You said novenas, you said a series of novenas?

A One.

Q You told me, you said more than one. You said I was making novenas. Weren't you referring to more than one novena?

A A novena is a nine-day series so sometimes people call it a novena or novenas but it's nine days.

*Deposition of Rose Cipollone*

Q You went through the nine-day series?

A Yes.

Q Who did you make the novena to?

A St. Jude.

Q Why St. Jude?

A I like him.

Q You like St. Jude?

A Yes.

Q You said to St. Jude in church, you said he shouldn't let you have cancer. Did you say that to St. Jude in church?

A I prayed that I wouldn't have cancer.

Q You said you were scared and you had the coughing and [p. 7116] the pain in your throat?

A Right.

MR. EDELL: Your Honor, if the defendants want to read it now, let them read it, because it is too out of context in terms of trying to ask questions. I think the tenor of the questions -

THE COURT: You have no objection to it being read but you want them to read it?

MR. EDELL: Correct.

THE COURT: Mr. Parrish.

MR. PARRISH: Where would you like me to stop?



*Deposition of Rose Cipollone*

MR. EDELL: I believe line two.

MR. PARRISH: Stop.

MR. EDELL: Designation goes through 165.

(Counsel confer.)

MR. PARRISH: Question: And when you were talking to St. Jude it was a serious matter for you then, wasn't it?

A Well, I don't know if you know anything about my religion and maybe I will clarify a point or two. A saint can only intercede in your behalf. He can't do anything. He can intercede for you so you ask him to intercede in your behalf.

Q What was it that you wanted him to intercede for you about?

A That I wouldn't be sick.

[p. 7117] Q You wouldn't be sick with lung cancer, isn't that true?

A That I wouldn't be sick, yes.

Q You wanted St. Jude to intercede for you because you were afraid of getting lung cancer; true?

A Yes. I was.

Q And you knew you could die from lung cancer, true?

A Oh, yes.

Q And you knew at that time that it was the cigarette smoking that you were afraid of causing your lung cancer, isn't that true?

*Deposition of Rose Cipollone*

A Yes.

Q You weren't telling God or this saint to intercede for you with God anything that was false, were you?

A No. I don't think so.

Q You really believed at that time that you could get sick from cigarette smoking, didn't you?

A Let's say I was afraid of death, getting sick.

Q You were afraid of getting sick to the point where you went to a saint to intercede for you on your behalf?

A Right.

Q Isn't that true?

A Yes.

Q You were serious about the fact that you thought you could get sick from smoking?

A You are going to fool around with a saint? Of course [p. 7118] you are serious.

Q At that time you didn't tell the saint that you thought cigarettes were safe, did you?

A Did I tell the saint cigarettes were safe? Come on, now, give me a break, too. I was going to say to the saint that cigarettes are safe, St. Jude? Why would I go then?

Phrase the question in another way.

Q Do you mean to say that why would you go to St. Jude if you felt cigarettes were safe? Is that what you mean to say?

*Deposition of Rose Cipollone*

A I was going to say why would I go to St. Jude if I wasn't afraid?

Q You were afraid because you thought cigarettes were unsafe. Isn't that true, isn't that a fact?

A I was afraid because I had a pain in my throat, and I didn't want to get sick.

Q From cigarettes?

A From cigarettes.

Q It was not in the background of not knowing about cigarettes. You had read the Surgeon General's Report as it appeared in the newspaper. Isn't that true?

A Right.

Q You had been talked to by your husband for years. Isn't that true?

A Correct.

\* \* \*

[p. 7121] Q Did you ever have occasion to hear the Surgeon General's Report on smoking?

A Oh, yes.

Q Did you hear about that approximately at the time the report was made public?

[p. 7122] A. Yes.

Q Did you ever have occasion to read that report?

A I believe I did and they had a big thing on T.V. about it.

*Deposition of Rose Cipollone*

Q How did you happen to read the report?

A My husband brought it to my attention.

Q Then you got it -

A The whole report?

Q Yes.

A No. I read the article in the paper about it.

Q Do you recall that the report, that that report talked about lung cancer?

A I do recall that it mentioned lung cancer and it mentioned heart disease and other things.

Q Did you believe what the Surgeon General said about lung cancer and heart disease?

A I don't know. I didn't want to believe it.

Q But did you?

A I don't know. I really don't know if I believed it or not.

Q But you did become afraid that you might get cancer?

A A little.

Q And you were saying novenas that you wouldn't get cancer?

A That is right.

[p. 7123] Q Do you also recall when a warning started to appear on cigarette packages?

*Deposition of Rose Cipollone*

A I don't really recall when it started to appear.

Q But you did see it?

A Yes, it was on the side of the package.

Q Do you remember the warning, "Caution: Cigarette Smoking May Be Hazardous To Your Health"?

A Yes.

Q Do you know what that meant?

A That smoking was dangerous.

Q You knew if you continued to smoke that you might get lung cancer, didn't you?

A I didn't believe it.

Q But you knew there was a possibility?

A I still wouldn't believe it.

Q Do you recall that a few years later the warning was changed to read, "Warning: The Surgeon General has determined that cigarette smoking is dangerous to your health"?

A I didn't recall. I didn't even notice that they changed it.

Q You didn't read the warning?

A Once it was on the package I didn't open the package and look at the warning and read it every time I smoked a pack of cigarettes. It was there.

[p. 7124] Q It was on the outside of the package?

A That is right.

*Deposition of Rose Cipollone*

Q So you knew it was there but you just didn't read it?

A Right.

Q Did your husband point the warning out to you?

A On the cigarette package?

MR. EDELL: When it changed? Is that what you are talking about, Mr. Northrip?

MR. NORTHRIP: At any time.

A My husband was always pointing out to me about cigarettes and the warnings.

Q You knew back when the Surgeon General's report and when the warning first went on the package that the Surgeon General believed that if you continued to smoke you might get lung cancer, didn't you?

A I don't know if I believed that.

Q You knew it was what the Surgeon General believed though, didn't you?

A I am sure that I didn't want to believe these warnings.

Q You didn't want to?

A Exactly.

\* \* \*

[p. 7127] MR. EDELL: Question: To your knowledge has any tobacco company or any representative of cigarette manufacturers ever represented in any way that the warning [p. 7128] on cigarette packages which you have seen are inaccurate?



*Deposition of Rose Cipollone*

A I don't know.

Q Well, do you know of any occasion when such a representation has been made?

A Yes. I recall. There was a representative from the tobacco company on television and they stated - rather she stated that there was no proof.

Q Who was that, if you recall?

A I don't know her name. She was a woman that represented the tobacco companies.

Q She said there was no proof?

A Right. There was no proof that.

Q When would that have been?

A Not too long ago.

Q You say not too long ago. Does that mean within the last year?

A Yes, I would say within the last couple of months.

Q Is that the first time that anybody from the tobacco company or representative of the tobacco company has made any statement that would in any way indicate that the warning was inaccurate?

A No. I had read articles in some newspapers, some of the answers to those stories.

Q Can you tell me about those, please.

A I couldn't specify because I read a number - read a [p. 7129] number of articles where the Tobacco Institute or the tobacco company said there was no specific proof that it caused cancer.

*Deposition of Rose Cipollone*

Q When do you recall that you read those? I am not asking for you the day obviously, but a period of time.

A Well, I couldn't give you a date. I think this was in sixties and seventies, early eighties.

Q Do you recall any particular company making such a statement?

A No, I don't.

Q Okay. Do you recall anybody on behalf of the tobacco institute other than the lady you told us about saying anything contrary to the warning label that appeared on cigarette packages?

A Do you mean a specific person?

Q Yes.

A No. I don't recall a specific person. But I had read articles like I mentioned to you where there would be issues that were brought up about smoking being hazardous or being not healthy.

Q Causing lung cancer?

A And causing lung cancer, heart disease, bladder cancer, things like that, and I remember reading articles where the tobacco companies or the Institute of Tobacco Companies or something to that effect, refused these and said it had had [p. 7130] not been proven specifically. I read articles like this and I heard them on T.V. and on the radio.

Q What period of time?

*Deposition of Rose Cipollone*

A As I said, during the sixties, late sixties, early seventies, and up until just a few or couple of months ago.

Q And when the Surgeon General's Report first came out and you heard about it and you first saw the warnings on cigarette packages, did that in any way impact on your smoking?

A It didn't make an impact on my smoking but it did frighten me a little.

Q But you continued to smoke just as much as you had been?

A Well, I was sure that if there was anything that dangerous that the tobacco people wouldn't allow it and the government wouldn't let them do that.

Q Okay. Did you consider the possibility that the government might have put a warning on to allow you to make a free choice - make a choice?

A I never thought about it that way, no.

Q When the warning came out on the packages and when the Surgeon General's Report came out, you continued to smoke and didn't try to cut down or quit, is that right?

A I continued to smoke but I did change brands of cigarettes. I was smoking cigarettes that had filters, cigarettes that had recessed filters, cigarettes that were [p. 7131] advertised to be low in tar and nicotine.

Dr. Lowy suggested to me that I change my brand of cigarettes.

*Deposition of Rose Cipollone*

Q But the Surgeon General's Report came out in 1964. Is that correct?

A Right.

Q And you were smoking L&M cigarettes at that time. Is that correct?

A I was smoking.

Q And had been for several years?

A Yes.

Q You didn't make any the change in your brand of cigarettes until 1968. Is that correct?

A I guess so.

Q So for approximately four years or three or four years after you have heard the Surgeon General's Report and saw the warning on the packages, you didn't make any change in your smoking habit. Is that correct?

A No. I kept smoking.

Q And didn't change your brand?

A I might have tried other brands but I didn't specifically smoke any other particular brands other than what I told you about.

\* \* \*

[p. 7132] Q Do you recall seeing the anti-smoking commercials on television?

A Yes.

Q Did your husband point those out to you?

*Deposition of Rose Cipollone*

A Definitely.

[p. 7133] Q Did you see doctors on those, do you recall any doctors on those?

A Doctors where? Did I go see a doctor?

Q No. Talking about when you saw the anti-smoking ads or commercials on television did they have doctors on them?

A I don't recall. I know they started to have T.V. commercials about it's your breath or it's your life, the Lung Association of America I think was starting to put these ads on T.V. That I recall.

Q Can you tell me any specific messages contained in those ads?

A It's a matter of life and breath. That was one of the sloans [sic] that they used. It's a matter of life and breath. Different things like that sort of thing.

I know my granddaughter came home to me one day when I lit a cigarette and she said, Grandma, smoking kills. Children were starting to get educated in school about smoking, so there was a bit about anti-smoking, yes.

\* \* \*

[p. 7140] Q What they simply said was that it had not been proven that cigarette smoking caused disease. Isn't that correct?

A Precisely.

\* \* \*

*Deposition of Rose Cipollone*

[p. 7143] Q But you never tried to cut down the number of cigarettes you were smoking?

A I believe that if I smoked milder cigarettes it would be okay.

Q What led you to believe if you smoked milder cigarettes that it would be okay?

A Well, because they were advertising there were cigarettes with lower tar and nicotine and filters.

\* \* \*

[p. 7145] Q What did the warning in the ads mean to you?

A The warning on the side?

Q Yes, in the ads. There was a warning in the ads, you recall seeing?

A Yes, I recall seeing the ads with warnings on the side.

Q What did the warning on those ads mean to you?

A That the Surgeon General thought or said that smoking would be hazardous to your health. It was a warning.

Q You knew that, didn't you?

There is a statement by Mr. Northrip: She knew what that warning said. She knew that the warning was there and it said cigarette smoking could be dangerous.

Q Is that correct?



*Deposition of Rose Cipollone*

A Yes.

Q Did you think you were smoking a safe cigarette?

A Yes.

Q That there was no risk to you whatsoever?

A Well, I didn't think there was a risk and if I did, I didn't want to believe there was a risk. You got to remember, I was addicted. I smoked, I smoked a lot. I was smoking for years. You just don't stop smoking like that. It's very difficult.

Q Did you ever try other than 1947?

[p. 7146] A I don't think so. I think I just went on in my own little world there smoking.

Q So the only time you ever tried to quit or cut down you did it with success?

A I didn't say that.

Q 1947 you - didn't you testify that you were somewhat successful in cutting down at that time?

A Yes.

Q That was the only time you ever tried?

A Right.

Q Can you tell us why you didn't try to quit after that date?

A It was very difficult.

Q To make a try?

A I don't hear you.

*Deposition of Rose Cipollone*

Q To try is difficult?

A Of course it was difficult.

Q Did you ever try to seek any help from anyone in quitting smoking?

A No.

Q Did you hear about stop smoking clinics?

A Yes, I had heard about them.

MR. EDELL: I assume this should be.

Q Did you ever try one?

A No.

\* \* \*

[p. 7147] Q What enjoyment did you get from smoking?

A I don't know how to answer that.

Q Did it relieve tension for you?

A I enjoyed it. I don't know if it relieved tension. It was pleasurable.

Q You mentioned at one time you didn't want to give your husband the satisfaction of reading articles he pointed out to you?

A Yes.

Q Why was that?

A Because he was so against my smoking. I would make believe that I didn't want to see the articles and

*Deposition of Rose Cipollone*

have him [p. 7148] point out to me that I should stop smoking.

Q Did you not want to give him the satisfaction of stopping smoking?

A It's not that it was a personal against him. It was just that I smoked and I didn't want anybody to tell me to stop smoking.

Q Because that was your business, whether you smoked or not. Is that right?

A Well, let's just say I enjoyed my smoking and I didn't want to give it up. I thought it hard to give it up.

Q And you didn't want to?

A All right, I didn't want to.

\* \* \*

[p. 7161] Q Did he tell you why?

A Well, he said to me, you smoke and you might as well smoke these, and he took out of his coat pocket a package of True.

Q Did he say anything else to you about them?

A No. He said if you're going to smoke, smoke these.

Q Was that the only reason why you switched to True?

A Yes. And, of course, I figured why did he tell me to switch to True? I saw the ads, local [sic] tar, low nicotine and [p. 7162] I figured they were better.

*Deposition of Rose Cipollone*

Q Can you recall any advertising concerning True cigarettes?

A Yes. I saw it in magazines, newspapers. There was a clock once with a True in it and it had numbers on it, nothing much.

\* \* \*

[p. 7206] Q But they didn't say their cigarettes were safe, did they, or that their cigarettes wouldn't harm you?

A Well, I saw ads that said doctors recommend that you smoke this.

Q What ads did you see that said that?

A They were ads when the filter cigarettes came out and I think it was in L&M ads the doctors recommend you smoke filter cigarettes. Is that what you mean? I just don't understand the essence of your question.

Q What I'm asking is: Did Liggett Group ever indicate to you in any way that cigarettes were safe or would not harm you?

A Let's put it this way.

They never said that they would. I don't know when you say the Liggett Group or you say this group, if they told me that they wouldn't harm me. I know that through advertising, I was led to assume that they were safe and they wouldn't harm me. Is that your answer?

Q Then I must ask you again, what ads, what ads led you to believe that cigarettes were safe and would not harm you?

*Deposition of Rose Cipollone*

A Well, the advertising, when they came out with low tar for instance, when they stressed the five percent.

\* \* \*

*A. Cipollone-cross*

[p. 7303] Q I think you also testified in answer to a question by Mr. Edell that when the Surgeon General's report came out, you brought that to Mrs. Cipollone's attention?

A Yes, I did.

Q And you told her that you were worried about her getting cancer?

A I worry about because whatever I read in the paper against cigarette and I just show it to her.

Q All right.

And didn't you tell her about the time the Surgeon General's report came out that you were worried about her getting cancer?

A I never said that. I never say that. I say I was worried about - I just show it to her, whatever it says in the paper.

Q Okay.

MR. COHN: Page 150, Mr. Edell.

Q Starting at line nine there is a question: "In the '60s I think you said that you pointed out the Surgeon General's report to her?"

"ANSWER: Right.

"QUESTION: Did you tell her that you were worried about her getting cancer?

*A. Cipolle-cross*

"ANSWER: Of course."

A Well, once it came out, I told her.

[p. 7304] Q You told her?

A Yeah.

Q That's all.

And there was a time like that she would just walk away?

A Just walk away.

Q Now, do you recall there came a time when warnings were printed on the packages of cigarettes?

A Yes.

Q And you called that to the attention of your wife, didn't you?

A That's the reason of that.

Q And you told her, look, the warning is right on the package now, correct?

A Something like that.

Q And she just walked away?

A Right.

Q And you really asked your wife to stop smoking all the time you were married, didn't you?

A Every time that I see it in the paper.

\* \* \*



*A. Cipolle-cross*

[p. 7318] Q You mentioned that you pointed out the Surgeon General's Report to Mrs. Cipollone. In fact, there were subsequent Surgeon General's reports coming out on a fairly regular basis during the late sixties and seventies, isn't that correct?

A Yes.

Q You would point them out any time there was publicity about them to Mrs. Cipollone?

A Yes. You have to think that I work long hours, and many times I didn't even read the newspaper. So how often did I point it out to her?

Q Would it be any time you saw an article?

A If I saw it, yes, but I don't read the paper every [p. 7319] night, every day. I had no time for that.

\* \* \*

*Carstensen-direct*

[p. 7609] Did you make an attempt to identify based on your reading of those depositions, the newspapers that Mrs. Cipollone regularly read or subscribed to?

A Yes. There was information on what newspapers were in the Cipollone household.

Q What newspapers were there?

A Well, I think I already talked about it earlier. After they moved to Little Ferry they subscribed to the Bergen Record and Mr. Cipollone brought the New York Daily News and/or the Herald Tribune home regularly. I think the deposition said daily, so those three newspapers were in the home with great frequency, on a daily basis, certainly.

*Carstensen-direct*

Q Did you identify articles in those papers that related to cigarette smoking and health?

A Yes.

Q How did you do that?

A Well, those three papers. I had already done a great [p. 7610] deal of other research as well. So in the case of those papers, I said [sic] about simply finding whether there were clipping filings. Typically, newspapers retain clipping files of their newspapers, and I had photocopies, sets of the newspaper had put in clipping filings relating to smoking and health and went through those.

Q Did you read them all?

A Sure, absolutely.

Q Do you remember, let us say, with respect to the Bergen Record, how many you found from the period 1961 to 1965?

A Well, in the clipping file there was nothing for '60. That had apparently been lost. There were 155 articles from the Bergen County Record for those four years.

Q And have you included certain of those in the jury binders?

A Yes. I think it is 102 of the 155 are included in the jury binder.

Q What about the Herald Tribune? How many articles did you find in the Herald Tribune?

A The Herald Tribune, which covers a greater number of years, 364 of which 222 are in the jury binder.

*Carstensen-direct*

Q And what about The Daily News?

A Daily News were 169, again in the clipping file that the newspaper had itself maintained, and 109 of those are in the jury binder. So there were, I think it comes out to 688 [p. 7611] articles altogether in the three newspapers of which there are, what, about 330 in the jury binder.

Q Now, am I correct that you stopped your search of those newspapers in 1965?

A Yes. Basically.

Q And did you rely on those articles that you found in coming to your conclusions in this case?

A Yes.

Q Is that something that historians customarily do in performing their research?

A Oh, for this kind of research question, absolutely.

\* \* \*

[p. 7628] Q These things that you've shown us, are they all the articles that you found about cigarette smoking and health, up to 1965?

A No. I forget the exact total number. I guess from '60 to '64, I guess about 47 articles in the Reader's Digest.

There were close to 700 in the newspapers and I didn't do an exhaustive real search flipping through. There may have been things that didn't make it into the clipping file.

\* \* \*

*Defrancesco-direct*

[p. 7829] Q Now, Mr. Defrancesco, I believe your father passed away in 1940. Is that right?

A October 15, 1940.

Q Was he a smoker?

A Yes, he was.

Q How old was he when he passed away?

A Fifty.

Q And do you know the cause of his death?

A Cerebral hemorrhage.

Q Is that a stroke?

A Yes.

Q Did your father smoke a lot?

A Yes, he did.

Q After - without telling me what was said, after your father passed away, did your mother talk about your father's smoking?

A Yes.

Q Did she talk - did she tell stories to you about your father's smoking?

A Well, we always witnessed my father smoking and she always said that coughing caused his stroke.

Q Did your mother tell that story to all of the children in the family?

*Defrancesco-direct*

A All of us, yes.

Q Including Mrs. Cipollone?

[p. 7830] A Yes.

Q Did your mother tell you and Mrs. Cipollone a story about -

MS. WALTERS: Objection. He is leading the witness.

THE COURT: Sustained.

Q Restricting it for the moment, Mr. Defrancesco, to stories that your mother told to you and the other children in the family, did your mother tell any other stories about your father's smoking, especially with regard -

A I do recall one particular story that -

MS. WALTERS: I want to clarify he asked about the question to him and other children in the family. Don't think it's clear.

MR. PARRISH: I think that was very clear in the question.

THE COURT: I will permit it. Overruled.

A On one occasion when my father had gone to the doctor with my mother, and the doctor had said to him, I think you should stop smoking, because he was coughing very much, he discarded the cigarettes and by the time he got to the corner he went back into the store and bought a pack of cigarettes, so they always - she always related this story to us.

*Defrancesco-direct*

Q Were there other stories or comments that your mother [p. 7831] made about smoking to you and the - and your sisters?

A Well, she was not happy to see them smoke, and she always reminded them of their father who smoked a lot and was always coughing and always attributed his death to the stroke caused by smoking.

Q Did you hear these stories from your mother frequently?

A Yes.

\* \* \*

*Martin-direct*

[p. 8226] Q Do you remember Dr. Cohen testifying about the public relations efforts of the tobacco industry?

A Yes.

Q Based on your expertise in consumer behavior, do you have an opinion concerning whether the public relations efforts of a - of the tobacco industry have a significant impact on the information environment?

A Yes.

Q What is your opinion?

A My opinion is that no, because there is again no empirical evidence, no data, no foundation for that kind of a conclusion.

Q Dr. Cohen testified specifically at Page 4772, that the industries public relations efforts are successful in getting stories into the newspapers, into the press, and these stories have punchy headlines. These are not dry,



*Martin-direct*

dull things. They are based on expertly-prepared public relations material.

Do you have an opinion whether public relations efforts, if they are done expertly have a significant impact on the information environment?

A Yes, sir.

Q What is that opinion?

[p. 8227] A My opinion is that public relations being a part of a marketing communications, the day you believe what was rendered in that opinion is the day you have made a great error and, quite frankly, also as the basis of my previous experience as a working newsman, that is not the way – not the way the press operates and to a large extent, an unfair indictment of the American press. They are not the handmaiden of any company and particularly the press that was cited in this case, for instance, the New York Times just doesn't run things because some company sent them to them.

It is my experience as a newsman and as a person who works in marketing and works with firms who do public relations.

Q Dr. Cohen testified concerning the formation of the Tobacco Industry Research Committee the predecessor of the Council for Tobacco Research?

A Yes.

Q And do you remember his testifying at page –

MR. EDELL: I object to the question. Mr. Bleakley says, do you remember that Dr. Cohen testified

*Martin-direct*

to the formation of the Tobacco Industry Research Committee.

What is that probative of? If he has a question to ask about the Tobacco Industry Research Committee he can ask it.

[p. 8228] THE COURT: Sustained to form.

Q Do you remember Dr. Cohen testifying at page 4677, that the announcement by the Tobacco Industry Research Committee – by the Tobacco Industry that it was – 4677 line 6, committing large sums of money to study the relationship between public health – between smoking and health – excuse me.

Do you remember his testifying to that?

A Yes.

Q In your opinion, does the dissemination of that kind of a press release, that is an industry is committing money to research in smoking and health have a significant impact on the information environment?

A No. And there is no empirical data to support it. There is no foundation for it.

\* \* \*

*Sommers-direct*

[p. 8574] Q Dr. Sommers what is the Council for Tobacco Research?

A Council for Tobacco Research is a funding organization for bio medical research, especially where relevant to smoking and health.

Q And who supports the Council for Tobacco Research or provides funding?

*Sommers-direct*

A All major cigarette manufacturers with the exception of Liggett & Myers.

Q What is the Scientific Advisory Board?

A Scientific Advisory Board is a group of individuals either M.D.'s or Ph.D.'s in different disciplines [sic] who are willing to examine applications to write analysis or critiques of them.

They are willing to come to meetings, read their critiques or analysis, have general discussion and [p. 8575] participate in voting whether they should be approved or disapproved. Then, if they are approved, each one writes a ticket, rating that particular application from best rating, number one, to weakest number five. That is their basic duty as a board.

Q When did you first have your contact with the Scientific Advisory Board?

A The first time I was - it was in 1965, and I was invited to give a talk on my research on host factors and cancer to the Scientific Advisory Board.

Q And what happened after that, further contact with the Scientific Advisory Board?

A In the following year, 1966 I was invited to join the Scientific Advisory Board and I did so.

Q Why did you decide to join?

A Well, there were two reasons. I was very impressed with the individuals who made up the Scientific Advisory Board.

*Sommers-direct*

Should I tell about some of them or would that be enough of it?

Q Well, if you will turn to the jury notebook please, page two, you might briefly want to tell the jury a little bit about the people who were there at the time.

A Yes. Not listed there, but who is there the year before and I got to talk to was professor Edward Wilson he was a father figure in statistics and epidemiology in the Harvard [p. 8576] School of Public Health. I was very impressed.

Kenneth Lynch, first one in the printed list was a pathologist. He was - he has recently been honored for being the first one in America to point out there was a disease in the lung from asbestos using autopsy material in the United States. Later he was the first one to draw attention to the combination of asbestos and lung cancer.

He was also the first one to use dogs as an experimental model in producing lung diseases in this field.

Dr. Andervont was one of my heroes in medical school. He is a lifetime employee of the Government, United States Public Health Service, and his service was chemicals that cause cancer. All kinds of chemicals.

Dr. Richard Bing is a famous cardiologist. He has invented various techniques for diagnosing and treating patients. He has received many awards, medically from West German Government, named scientist of the year by the College of Cardiology four or five years ago, and most unusual, there is a Richard Bing Fellowship, fellow trainees, colleagues and friends put up money. So every

*Sommers-direct*

year there is a Richard Bing fellow who gets a salary from that.

McKeen Cattell was the chairman of pharmacology of Cornell, had his own journal, had broad and deep knowledge of drugs, of medication.

[p. 8577] Leon Jacobson, an internist and hemotologist also interested in radiation damage, was for a long time the dean of the University of Chicago Medical School, now called Pritsker's School. He built it up were [sic] personnel and funds.

Member of the National Academy of Science. The highest level you are invited to. Not just medicine [sic] but various kinds of other science besides. And I forget if I mentioned it, he was on the cancer psychiatry committee at one time.

Dr. Clarence Cook Little, he was the president of the University of Maine and another time president of the University of Michigan. He was the director of the organization that later became the American Cancer Society. He is most famous for organizing the mouse colony in Bar Harbor, Maine, where all the inbred mice now spread all over the world were originated, and it is still going on and called the greatest advance in cancer research in the 20th Century. I think it is, except in the last ten years, now we have something equally or more important, but anyhow is the first scientific director of the Council.

Then Stanley Reimann, pathologist from Philadelphia, very interested in the development of cancer and different tissues and interested in German pathology,

*Sommers-direct*

belonged to the German pathology society and visited every year, academic pathologist of importance.

[p. 8578] Then Dr. Rienhoff a pioneer from John Hopkins of thoracic surgery.

Q Dr. Sommers, based on your experiences with the Scientific Advisory Board, why do the members decide to serve?

MR. EDELL: Your Honor, I will object. He can certainly go into why he has decided to serve.

THE COURT: Sustained.

Q Why did you decide to serve?

A I already mentioned how impressed I was with the people.

Secondly, I think if you are in research and do research and have published in research, you have a sort of a duty to help younger people get started in research and to help establish scientists who may have a hard time getting money because their field might not be popular to continue their research.

And the other thing about it - well, two other things, other thing about it is you see the most-challenging diseases right now and for the past 40 years or so, are the chronic diseases of older people, they have sometimes been grouped as degenerative diseases including cancer under this definition and it is thought now they have multiple factors and I am interested in trying to find out more about any, some, or if possible, all of these diseases,



*Sommers-direct*

and then finally when you go to an advisory board meeting, you hear [p. 8579] the latest science discussed across the table.

This fellow's work was already done in California. It's follow-up research, that sort of thing, we will not support it, when you get a full review of all the medical areas.

Q You mentioned the review of the grants as one of the purposes of the Scientific Advisory Board. I would like to show you what is marked Defendants' Exhibit 3008, and ask you -

MS. WALTERS: Can we see it?

MR. SIRRIDGE: Yes.

Q If you can come down and explain to the jury with the aid of the exhibit how applications are reviewed by the Scientific Advisory Board. First, let me ask you:

How does a researcher find out about the Council for Tobacco Research in order to apply?

A If he read the scientific literature he will run across an article that gives credits for support. This work was partly supported by this, that and the other organization, among them are the Council for Tobacco Research. May never have heard of it, look us up in the book of organizations that support research, write us a letter, give us a phone call.

Secondly, his colleague who just got money will tell them him that the council allows funding in your field [p. 8580] perhaps.

*Sommers-direct*

Q How many grant applications are there each year on an average?

A Varies, but it has gone up and up to over 300 a year. So however he hears about it, word of mouth, reading literature, there is an annual report of which he may or may not have seen. He contacted us, and is -

Q I think I fouled up here and got wrong one up front.

A All right.

Q Let me do a quick change here and put this one up.

A All right.

Q That is it I, think.

This is 3,010. Let me put this one up here, without hitting you in the neck -

A Or anyone else.

Q - and ask you to kind of describe briefly the process that happens at the Council when an application is received?

A All right.

MR. EDELL: We can see.

Q Okay.

A The researcher sends in an application. The application is very much like to other funding agencies such as the National Institute of Health. Format is very similar to applications say to the American Cancer Society. It is in detail.

[p. 8581] When the application reaches the office of the Council for Tobacco Research, members of the staff, two of them, assign sub committees of Scientific Advisory Board. If it's a cardiovascular application, no doubt Dr. Bing will be on it, and one or two other members of the Scientific Advisory Board.

If it is the kind of application nobody on the board is competent to discuss, then outside reviewers will be requested in writing or telephone, would they be willing if they receive the advertisements, to write a critique and get it in by the next meeting. And so then six telephone type size books like this, now a days, go out to each member of the board about a month before the semi-annual meeting. All the members of the board are supposed to be familiar with all of those applications, whether or not they're on the subcommittee.

So, then the meeting takes place and the chairman first takes care of some administrative details, which have to be approved by the board and then he goes on and calls the first application by the last name of the principle investigator and asks one or another member of the subcommittee to read his critique. That is done.

Then the other critiques are read, including those, if any, from outside reviewers and there is general discussion around the table.

[p. 8582] Then the chairman of the board calls for a motion to approve or disapprove. Now, if the motion is disapproved, that's the end of the opportunity by that person to get any money. They will receive a letter which says, we regret we can't fund your project and so and so

and, but if you wish to submit another project, we would be pleased to consider it at any time.

If the motion to approve carries, then as I think I mentioned already, each member of the board writes out a ticket with the number of the grant, the person's name and a check mark or number one, merit and that's also the relevance to smoking and health to five, the weakest.

Those are collected and averaged but nobody knows what the average is of any of them until after the meeting.

Q What happens after the Scientific Advisory Board rates the approved projects?

A Well, after the meeting ends, it's been a three day semi-annual meeting for some years, then usually as soon as possible, the next week, the scientific director, the research director, the four members of the scientific staff who are full-time scientists in the office, and usually the president, because he keeps score as to the average ratings, meet and now a days they look at a computer printout of how everybody rated, who is approved.

The top rating is 1.0 like A plus, absolute best. [p. 8583] Then it goes down to maybe 3.5.

Then the scientific director, it's his responsibility to decide who gets the money and he has to follow the advice of the Scientific Advisory Board on the 1.0s and all the way down through the ones and usually halfway through the 2.1s, 2.2s, 2.4s.

Now, since it's a semi-annual meeting, we feel we should only spend half the budget at each of the meetings. So at some point the administrator will say, well,

*Sommers-direct*

now you spent \$3 million and we only got -- really if you want to save something for the next meeting, you better not have very many more. So then at that point the scientific director is allowed a little discretion. If somebody is 2.6 and somebody else is 2.7, that's not a statistical difference anyway. And if we feel we haven't had as many cardiovascular projects as we hoped, we want to help build up cardiovascular research, the director is permitted to move that slightly lower rating up and to fund that one and not to fund the one above, which might be on bio-chemistry of some kind of vitamin substance.

Q Let me ask you, doctor, when there is a decision to award a grant, who does it go to?

A An individual never gets the money. It always goes to the institution.

Q Can you give the jury an idea of the kind of [p. 8584] institutions, organizations that grant belongs to?

A There are very many medical schools and universities and hospitals. Then there are free-standing, non-profit research groups like Scripps Research Institute in La Jolla and there are some community hospitals.

And then a grant may be given to a commercial research organization in biomedical science, like Illinois Institute of Technology, for example.

Q Dr. Sommers, can a scientific advisory board member make a grant application to the council?

A Yes.

Q What happens when a scientific advisory board member does so?

*Sommers-direct*

A Well, naturally that person isn't allowed to participate in the discussion or decision. He's out of the room.

Besides that, there must be two outside reviewers to give critiques. Besides that, there is a ground rule that all the members of the Scientific Advisory Board together cannot receive more than 15, one five, percent of the budget. And as one looks back, it's rarely been above five percent.

Q Dr. Sommers, have you ever applied for a grant?

A Yes. I believe three times.

Q And was that grant awarded to you or an institution?

A No. It was awarded to Delfield Hospital in the first [p. 8585] instance and to Lenox Hill Hospital where I was working in the latter two.

Q In your experience on the board, Dr. Sommers, has a Scientific Advisory Board member ever applied for a grant and been turned down?

A Oh, yes. Without naming individuals, one individual has had many more turned down than accepted and another individual, who's a very important scientist, I certainly remember once he was turned down, so, yes.

MR. EDELL: Just so we're clear, we're talking about prior to 1981?

MR. SIRRIDGE: Yes.

Q As long as we're standing here, Dr. Sommers, let me put the first one back up and have you describe for



*Sommers-direct*

the jury what happens after a grant has been awarded to an institution. If you could briefly tell the jury how the process works.

A Well, let's be clear that the money is given to the institution for the benefit of the work of the team or the individual who has got the grant. They just don't mingle it with all the other institution funds, we hope.

So the research begins. Ordinarily, it begins either July 1 or January 1. That's not inevitable. So when the grant is funded, then there is a check, because it turns out about 80 percent of the grantees have other support. [p. 8586] You can't keep a lab going just with the funds from one organization. You've got technicians, you've got post-doctoral fellows, you've got animals you have to pay so much a day for their care and so on. As I say, four out of five have support from other sources, like the National Institute of Health and individual granting agencies, cancer, heart, lung, so on.

You see, otherwise you'd be hand to mouth and if anything went wrong, you would be out of business. And once a team's broken up, it's awfully hard to ever reform a research team.

So, we check to see if their same or similar application went into another organization that might have a lot more money, like the National Cancer Institute has a billion dollars a year and then the applicant or the grantee, he's a grantee now, is given a choice; which one do you want to take, ours or theirs but you can't double dip, naturally.

*Sommers-direct*

So we understand it either hasn't been acted on or he didn't get the money from whatever source, if there was a competing application and there may not have been any. This may be the only outfit he's asking for money. Then one of the staff or the research director or the scientific director becomes the monitor for that individual. That means he's supposed to be available on the telephone, answer [p. 8587] letters, help the investigator in any way.

Every year, 18 months, every grantee is supposed to be visited in his or her laboratory by the monitor who may take along another staff person, member of the Scientific Advisory Board or some outside scientist and the idea is to see several things.

One, any way we can help you. Do you need more equipment or money? Secondly, how are you doing? Usually there are presentations by some of the junior members of the team. Then from the viewpoint of the council, is the money being well spent? And, number four, what's your progress? You're going to write it up. It's required to write a progress report but in between, how are you getting along? What have you discovered? A grant is literally a gift and, therefore, if the researcher decides he's got something better to do, a better experiment, he or she is allowed to do it, they don't have to use the money for the grant that was approved and funded.

All right. So there we go about visiting the researcher. And the reviews are usually written up by the monitor he visited, Dr. So-and-so and here's what's going on. Those are provided to the other staff members, scientific and research director.

*Sommers-direct*

Then there is an annual report which lists all the activity grants with abstracts of what they're doing and [p. 8588] those have to be approved by the authors.

So that's the bottom line in the center. What of course is hoped is that the investigator who receives the money will spend it wisely, will discover something and when he does, he'll report it at a medical meeting or with a poster and then he'll publish it.

Q Doctor, have grantees from the Council of Tobacco Research ever won any awards?

A Oh, yes. There are quite a few. The Lasker Award, Mary Lasker of New York, at least two. Then recently one of our younger grantees became a Markey fellow, that's said to be very competitive, and two of our grantees have received the Nobel Prize in medicine.

Q Dr. Sommers, do - I'm not sure I understood what you were saying. Would some of the research grantees receive funding from other organizations at the same time?

A Yes, nowadays in the last few years more often the case. And it's an exception if the individual or grant is funded only by the council.

Q Let me ask you, Dr. Sommers, I didn't ask you at the time but the do the advisory board members, do they serve on other review boards for scientific research?

A Oh, almost all of them either are on or have served on other boards and review applications for funding from other sources, yes. I mentioned the president of the Cancer [p. 8589] Advisory Board is just one example.

*Sommers-direct*

Q Do you know whether this process that we discussed, the grant approval process, how that compares to other organizations?

A Well, it's very similar to the organizations that - at least I have served, Breast Cancer Task Force and so on. It's the nature of the process of trying to choose the best investigators and the best institutions who it's hope will do the best research.

MR. SIRRIDGE: This is a little bit late. We're having time problems here on this one, your Honor.

Q We can pick this up later.

Dr. Sommers, why don't you resume your seat?

A Yes.

Q Dr. Sommers, could you give the jury an idea of the areas of the research that are funded through the council?

A Yes. Let me see now. I don't know if I'm under some time constraint. Can I tell how long it's been since it started? Am I allowed to tell that?

Q The time constraint is basically before 1982, so -

A I can't tell how old it is now. Is that the idea?

Q I'm not sure what the idea is, but give the jury an idea the types of areas that have been supported during your time on the board.

A Over the total time and expenditure of money which, let [p. 8590] us say, in 1981, '82, was around \$100 million. The majority has gone into cancer research. And

*Sommers-direct*

if you take the whole period, it's certainly over 55 or 60 percent.

Now, in the years 1981, when I became the scientific director and '82, then the next biggest funding, in terms of dollars, was about equal for chronic pulmonary disease and that's bronchitis, emphysema and for cardiovascular disease and arteriosclerosis.

Then beyond that, the next highest total amount was spent on pharmacology and that's largely nicotine pharmacology and it's a field that's really tremendously expanded and revolutionized beginning about ten, 15 years ago.

Then the next funding, in dollar amounts, is an immunology because, you see - well, it involves so many diseases, but with respect to cancer it's believed as people get cancer their immune defense isn't as strong and that's one of the reasons cancer grows.

This is not the only kind of immunology research. There is a lot of very basic research going on in the molecularly constitution variability, specificity, so on, of immune reactions.

Then beyond that, we have something new which the board has become very interested in since about 1970 and it's called molecular biology. That deals with things like [p. 8591] DNA and cell membranes and organelles and cells. And it's the kind of cutting edge of fairly far out research, which some day can't help but be relevant to some human diseases.

*Sommers-direct*

Then finally epidemiology. Years ago quite a bit of money was spent on epidemiology. More recently less money.

And those are the fields that make up the research activities that the council has funded, experiments.

\* \* \*

*Spears-direct*

[p. 10143] Q. Dr. Spears, has Lorillard participated with other [p. 10144] cigarette manufacturers in funding research on cigarette smoking and health through CTR?

A. Yes, Lorillard has supported CTR.

Q. And that was going on when you came on in 1979?

A. That's correct.

Q. Would you tell us the type of research that Lorillard was funding through the Council For Tobacco Research when you came and during the period of time up to 1966?

A. Yes. The type of research that we were funding was related to diseases that had been statistically associated with tobacco smoking, and I'm not sure at the time - I guess all of the current diseases were then statistically associated to some degree prior to '66.

Q. What was the purpose of Lorillard's funding research through the Council For Tobacco Research?

A. Well, it was an efficient, more efficient way of funding research into the general area of causation than it was to conduct research individually, as individual companies. So that would be one of my purposes for funding



*Spears-direct*

it through such an organization as opposed to through an individual.

It also provided or allowed for many independent investigators to work with no interference from the industry.

Q. When you say it allowed for investigators to work without any interference from the industry, would you describe how the funding worked so there would be no interference from the [p. 10145] industry?

A. Yes. The industry provided monies for a research budget, and that research activity was administered through the CTR organization. But the actual determination as to what research was done was in the hands of a Scientific Advisory Board, a group of independent scientists who determined what actual research would be done.

Now, in fact, they reviewed applications for funds from individual investigators who came in to them relative to the overall mission of CTR and decided which ones would be funded.

Q. Did the CTR have a board of directors?

A. Yes, the CTR had a board of directors. That board was made up of the representatives of the member companies.

Q. And what role did that board of directors play?

A. Well, it played no role in determining what research would be done. It played a modest role in the administration - that is, such things as the salary of the

*Spears-direct*

staff, the approval of recommendations made by the president, benefits, administrative costs, offices, that sort of thing, and approved the research budget generally as it was proposed by the research director.

Q. Was the Council For Tobacco Research and the tobacco industry concerned with public relations during the period of time from 1959 to 1966?

A. Certainly they were concerned with public relations. I [p. 10146] think any industry would be concerned with how the public views them, and also how their customers view them.

Q. Was the CTR work published?

A. Yes. All of the CTR work that the investigators wrote and submitted as publications, those that were accepted by the journals were published, yes.

Q. Was there a scientific director?

A. Yes, there was a scientific director.

Q. And who was that during the time period 1959 to 1966?

A. Well, I think it would have been Clarence Cook Little through that period.

Q. And who was Clarence Cook Little?

A. He was a person who had attained a scientific reputation in the area of animal genetics at the Jackson Laboratory. He was a renowned authority in that field.

Q. What would be the relevance of animal genetics to work related to smoking and health?

*Spears-direct*

A. Well, as I explained a few minutes ago, the only animals that one could produce tumors in significant numbers on the skin of mice were selected genetically, reasonably genetically uniform animals; that is, it is possible to breed animals for experimental work which are highly susceptible to various insults that one might provide to the animal, or they might be very susceptible to a given disease. These then make them much more useful as laboratory models in producing a response in [p. 10147] that, obviously, if you can't get a response in the animal's system, you do not have a bioassay.

The Jackson Laboratory was a pillar in that regard in that prior to its establishment, the information and availability of laboratory animals that were genetically uniform was very sparse and was leading to a lot of confusion in terms of bioassay results.

So that the formation of that laboratory and Dr. Little was very instrumental in ultimately providing animals that were very useful in laboratory research.

Q. Again limiting the question to the time period we've been talking about, 1959 to 1966, what was the role of the scientific director of the CTR in relationship to the Scientific Advisory Board?

A. Well, he was a member of the Scientific Advisory Board, and his role was to interact with the investigators; that is, he would see that the grants were awarded according to the wishes of the Scientific Advisory Board, and carry out basically their instruction in that regard.

*Spears-direct*

Q. How did the Scientific Advisory Board go about distributing the funds provided to the CTR for the tobacco industry?

MR. EDELL: Your Honor, I didn't object to background information. Unless there's been some showing that this witness participated in that proceeding from a factual perspective, I [p. 10148] don't know how he's qualified to testify.

Q. Do you have actual knowledge, Dr. Spears, of how the Scientific Advisory Board functioned?

A. Yes, I do, and I participated in that proceeding at one time.

MR. EDELL: During that time frame?

THE WITNESS: No.

MR. EDELL: Well, I think that's the issue.

THE COURT: Sustained.

Q. Dr. Spears -

THE COURT: There's already been evidence on this, has there not, Mr. Northrip, as to how it operated?

MR. NORTHROP: There may be, Your Honor. I'll move on.

Q. Dr. Spears, do you know how the Council For Tobacco Research received research proposals?

A. Yes.

Q. And -

*Spears-direct*

MR. EDELL: Your Honor, I don't want to keep jumping up, but I think this whole area, unless he has firsthand knowledge -

MR. NORTHRIP: Your Honor, I've limited the area. I believe this is relevant and it's appropriate.

THE COURT: Well, it's a question of time, if he was there at this time. We're talking about the pre-'66 period.

[p. 10149] MR. NORTHRIP: Well, I think he has knowledge of how it was done at that time, Your Honor. He was in charge of R&D.

THE COURT: Well, ask him if he knows, if he has knowledge as to how it happened and what's the basis for that knowledge.

MR. NORTHRIP: All right.

Q. Dr. Spears, do you know as to how the Scientific Advisory Board got proposals in the pre-1966 era?

A. Yes, I do.

Q. And how did you come by that knowledge?

A. I knew that from meetings with individuals at the CTR, and I also know it from their publications, and those are the reasons.

Q. Was the Council For Tobacco Research at that time funding primarily grant or contract work?

A. It was essentially a hundred percent grant work.

Q. And would you describe what the grant work means?

*Spears-direct*

A. Yes. A grant means that an organization has a sum of money to award for research in given areas. Investigators, independent investigators are encouraged to apply for the funds to do work in these areas, and the investigator describes a project that he might wish to do or she might wish to do, including a general outline, background, why it's important work, and so forth.

That would be the grant proposal or request from the [p. 10150] investigator.

Q. How does grant research differ from contract research?

A. In contract research, the work is basically conceived by the contracting organization. A proposal is written or protocol is written which describes the work in detail as it will be done, and a contract is let. It frequently may be bid by a number of parties who are interested in doing the work, but once the contract is awarded, the investigator performs the research as spelled out in the protocol.

Q. Is there a difference in freedom to publish results?

A. Somewhat, yes, in that the organization that awards the contract actually owns the information and controls the information, and frequently, the contract will indicate that that is the case, and that the contractor will frequently at least review the information before it's published.

Q. Could you tell us how many researchers and institutions have been supported by CTR funding prior to 1966?



*Spears-direct*

A. Yes. There have been about I think 100 institutions, 280 investigators, and about 465 publications have resulted from that work at the end of 1966.

Q. Do you know if the individual scientists who applied for the grants got the funds?

A. No. The monies go to the institutions, and the institutions which the investigator is working, such as the university, administers the funds along the line items that are [p. 10151] set forth in the grant request.

Q. And did the Council For Tobacco Research during the time period 1959 to 1966 make available to the general public reports describing the research of funds?

A. Yes. There is an annual report which is issued annually. It contains abstracts of the projects and lists all of the active projects that are ongoing. Those reports are distributed to all of the major libraries and interested parties on the mailing lists.

Q. How about, does CTR take any affirmative steps to see that the reports area available to the medical and scientific community?

A. Yes, they actually mail them to many such organizations, as I said, the libraries and societies.

Q. And, Dr. Spears, limiting your answer to the time period 1959 to 1966, was the research being funded by the Council For Tobacco Research quality research?

A. Yes, in my opinion, it was, very definitely.

Q. Was it related to smoking and health?

A. Yes, it was.

\* \* \*

*Spears-cross*

[p. 10184] Q Question of DDD, Doctor, the insecticide?

A Correct.

Q Known to cause cancer in humans?

A No.

[p. 10185] Q Known to cause cancer in animals?

A Yes.

Q And you asked Dr. Homburger to perform certain research with regard to DDD. Is that correct?

A Why don't I explain it?

Q Sorry.

A May I explain it?

Q Let me ask the questions and you can tell me whether or not if Dr. Homburger did research involved [sic] DDD for Lorillard.

A We did not ask him to do research. We asked Homburger to test certain fractions and materials isolated from tobacco smoke.

Q Lorillard identified DDD is in tobacco smoke?

A Yes, correct.

Q And you sent the smoke condensate off the fraction - sorry, containing DDD to Dr. Homburger and asked Dr. Homburger to see whether or not it produced cancer in animals?

*Spears-cross*

A There was a series of experiments, correct.

Q And Dr. Homburger was able to produce cancer in animals with the fractionate DDD that you sent?

A He was able to produce tumors with very large quantities of DDD.

Dr. Homburger was also able to illustrate that the [p. 10186] fractions that contained DDD were active but they also contained many other compounds.

Dr. Homburger also got an indication that when DDD was added to tobacco smoke condensate that there was an increase in the number of tumors. As I recall those were the results.

Q That is that DDD, had an additive affect to the carcinogenic properties of tobacco smoke?

A When DDD was added to tobacco smoke condensate there was an increase in -

Q DDD was used on tobacco used in cigarettes by Lorillard consumers, correct?

A The farmers used DDD and DDT to - at the times leading up to that discovery, yes.

Q Tell us what journal the results of that study were published in?

A That was not published.

The reason I think should be clear that DDD and DDT were no longer used in tobacco shortly thereafter and we were aware of the fact that they were coming out.

*Spears-cross*

It was also true that DDT was a known component of tobacco smoke and also known to be an animal carcinogen -

Q Did Lorillard tell the consumers?

A No. Lorillard didn't tell the consumers.

\* \* \*

*Spears-redirect*

[p. 10279] Q Dr. Spears, you have been shown a document from Dr. Seligman at Philip Morris, Plaintiff's Exhibit 6800A?

A Yes, I have.

[p. 10280] Q Do you have it in front of you?

A Yes, I do.

Q And that - does that document contain recommendations for industry research, as well as the subject that Mr. Edell referred to as subjects to be avoided?

A Yes. There is a separate page entitled "Potential Long-Term Scientific Studies."

Q Would you review some of those studies that Dr. Seligman was recommending the industry should do?

A You want me to read them?

Q Yes.

And tell us if those are relevant to smoking and health, please.

A Number one is Validation of new short-term bioassays versus long-term skin painting and inhalation.

That would be relevant and if one could achieve it, it would be important because long-term skin painting takes two years and inhalation experiments usually take two years or more, so it would shorten the time to get valid results.

Correlation between skin painting and inhalation, is another suggested topic.

I think again the relevance is self-apparent.

The effect of environmental and other factors in skin painting and/or inhalation, and there are a number of subjects under that; "Skin painting in germ free animals, [p. 10281] Effect of diet on tests, Effects of inducers in diet on test, Viral environment/immunological" - these all relate to other factors or factors other than the treatment, which might be affecting the result in either skin painting and inhalation experiments. Some are known to affect it, such as the viral environment.

Inducers in the diet relate to enzyme inducers, and it is thought generally that enzymes play a role in activating carcinogens, become the compounds that actually react with the genetic material.

The next one is "Effect of strain variation in skin painting." I have already indicated this is very important, that what you get depends upon the genetic strain of animals that you select.

"Different species response to smoke and/or condensate." Again, not only strain variation but the actual species of the animal.

And other subjects they were recommending are quite relevant. "Relevance of long-term tests to man in

biochemical terms only," and that relates to determining what the biochemical aspects of the animal relates to biochemical aspects of man, which would aid in the interpretation of any animal result.

"Investigate threshold of carcinogens in various species with specific chemicals." In other words, what is a [p. 10282] no dose effect, if there is one.

"Investigate end points of bioassays, especially in inhalation," and this appears to relates [sic] to other end points other than cancer in that the bioassays do not give rise to lung cancer.

Smoke-related effects in respiratory system using single or multiple smoke component. I guess that deals with singling out components with tobacco smoke and carrying out inhalation studies on that alone would be quite relevant.

Metabolic fate of nicotine using labeled nicotine in animals, that is simply what happened to nicotine after an exposure or dose.

How it is eliminated from the body and how long does it take. Again, quite relevant to smoking.

Interaction of nicotine with drugs. This has to do with the possibility that nicotine induces enzymes which metabolize, facilitate the metabolism of other drugs.

Positive effects of smoking, and talking about - not sure what this is - something frustration. Something frustration by smoking.

Q Maybe "easing"?



*Spears-redirect*

A Easing frustration by smoking.

Address the question whether or not any nitrosamines are relevant to inhalation toxicology.

Quiet [sic] appropriate and I assume it means, the [p. 10283] suggestion is one should be doing inhalation with any nitrosamines themselves.

The nitrate dilemma, skin painting versus inhalation. How does one manage the trade off and this relates directly to the observation that it had been known for many years back into the 50's, that nitrates we added to tobacco reduce the activity on mouse skin.

However, at the same time, other classic compounds were being formed, nitrosamines and discussing is there a way to assert the toxicology of the nitrosamines versus reduction on animal skin.

And the next one is ambient smoke, any danger to the nonsmoker. This relates to environmental tobacco smoke.

Effect of smoke and/or nicotine on animals versus acclimatized animals.

This relates to the idea that something - animals adapt, most animals adapt after some exposure and the question being posed here as to whether or not the effects of tobacco smoke are different on animals that have been preconditioned, if you will, with the tobacco smoke.

And the last one is adaptation to environmental insults.

I guess it relates to how the organism relates to any insult, not just tobacco smoking.

*Spears-redirect*

Q Dr. Spears, were all these proposed scientific studies [p. 10284] relevant to smoking and health, in your opinion?

A Yes.

Q In regard to the subjects that be avoided, do you agree that [sic] those subjects should be avoided?

A I don't know that I agree with it.

For example, "developing new tests for carcinogenicity," the Government and others have been working in this field for years and years, it is a long-term proposition. It is doubtful that CTR could make much progress in that area relevant to what already has been going on in the scientific community. I would agree with that as not being a very promising area for the Council for Tobacco Research.

"Attempt to relate human disease to smoking." I am not really sure I understand what that means.

But if it means epidemiological studies, they have already been conducted and I would again not see much expectation for differing results in epidemiological studies by simply repeating them, so I agree that it would not be an area that I think would be very productive scientifically.

And the last, "Conduct experiments which require large doses of carcinogen to show additive effect of smoking."

That seems to be rather relevant if you really mean large doses. It has some relevance if you are talking about [p. 10285] small doses because there are other - there are

*Spears-redirect*

carcinogens in our environment in our air here in the courtroom, food we eat and so forth. Maybe small doses might be relevant but not large doses, in my judgment.

Q Do you know if any action was taken in regards to the letter and the subjects to be avoided?

A As I stated earlier, I am unaware of any communication of this to the Council for Tobacco Research. This was a kind of a planning function.

\* \* \*

*Deposition of Rose Cipollone*

[p. 11152] Q Mrs. Cipollone, You've testified at length about what your husband told you about smoking and the fact that he didn't like smoking and wanted you to quit and the fact he showed you various articles. Is that correct?

A Yes.

Q And he showed you articles that said if you had stopped smoking, you would have a lesser chance of getting these diseases that were related to smoking according to these articles. Is that correct?

A I don't understand that question.

Q My question is did he show you articles that said if you stopped smoking, you would have a lesser chance of getting lung cancer, heart disease, or emphysema?

A I think the articles that you are referring to, they [p. 11153] would be news articles like T.V. or in the newspaper. He would draw my attention to articles that stated cigarette smoking was dangerous and caused heart disease, lung cancer and various other diseases. That is what drew my attention to those.

*Deposition of Rose Cipollone*

Q He drew your attention to those because he wanted you to quit. Isn't that correct?

A Yes.

Q My question is did he also direct your attention to articles that said if you stopped smoking you would have a lesser chance of getting some of those diseases?

A That was the same type of article.

Q Do you recall seeing those articles?

A Yes, I do.

\* \* \*

*Harris-cross*

[p. 11429] Q Is it your testimony that the funding of basic research by the Council for Tobacco Research is somehow wrong?

A Not wrong, but it is not enough.

Q But if you are doing basic research along with other research, it is perfectly appropriate, isn't it?

A This is very abstract.

The answer would be that it is fine to fund basic research. In fact, much of the research that the Scientific [p. 11430] Advisory Board funded, that is not the lawyers, but the scientists, was basic research on different aspects of the body's defenses on cancer, viruses and cancer.

On the other hand, in fact, Dr. Wakeham and many other scientists commented most of CTR's research is directed not towards tobacco and cancer but cancer in general, but it could be scientifically meritorious research.

Harris-cross

Q And the Scientific Advisory Board funded a good bit of research?

A In cancer, in general.

Q It was research done by reputable investigators?

A Sometimes.

Q You will give me that?

A I am going to have to say sometimes.

Q We will take it. At least some of the research that was conducted by investigators, funded by the Council for Tobacco Research, was done by reputable investigators?

A True.

Q A lot was, wasn't it?

A I -

Q The research was quality research, wasn't it?

A Some of the research was, especially the research on basic aspects of cancer, some of it was quality research. I think that is correct.

\* \* \*

[p. 11650] Q Dr. Harris, do you remember yesterday when I asked you whether it was not a fact that 37 studies that had been funded by the Council for Tobacco Research between 1954 and 1964 were cited in the 1964 Surgeon General's Report? Remember when I asked you that?

[p. 11651] A I certainly do.

Harris-cross

Q Your answer was you didn't know?

A No, I didn't know. I had never made that count.

Q You never made any effort to determine before you read your opinions in this case, whether any of the research that had been done by the Council for Tobacco Research was used and relied upon by the Surgeon General in 1964?

A I knew that. But I didn't know how many and I hadn't taken a look and accept [sic] what they were cited for, in what chapter and what purpose -

Q Did you identify one before I gave them to you yesterday?

A Yes.

Q Which one?

A Studies by Deyman, on congress and smoking were cited in the study by Carl Seltzer on morphological - different work on smokers, between smokers and non-smokers I knew was funded by CTR, and I knew was certainly relied upon and mentioned in the Surgeon General's Report.

Q Now, yesterday after the close of court, I gave Mr. Edell and he gave to you each of the 37 articles that I referred to, did he not?

A Yes. I read them.

Q Did you read all 37 yesterday?

A I had a long night, but I did.

[p. 11652] Q So you are now able to confirm that 37 studies funded by the Council for Tobacco Research



between 1954 and '64 were cited by the Surgeon General in his 1964 report?

A Well, I am not here to play a numbers game.

Q Say yes or no.

A If you just want yes or no, the answer is no.

Q How much did you find that were cited in the Surgeon General's reported?

A I found 38 citations. I found that they were duplicative and reflected 29 papers. But I must say if we understand what the 29 means -

Q I am not asking you for that. I am asking you whether or not you confirmed what I said.

You are telling me my numbers were wrong, it wasn't 37 it was 29, because some of them were duplicative?

A It is true they were duplicates but we have to look at the 29, what they mean.

Q Answer my question.

When Mr. Edell gets up he can ask you about the import of these to science and medical health and smoking, okay?

A I understand.

Q For the moment you answer what I ask.

A The answer, direct answer is that there are 29 different papers cited for one reason or another in the Surgeon [p. 11653] General's Report, that if we go back to the paper, are listed in two places. First, in the footnote to

the paper it will say we knowledge [sic] support of either TIRC or the Council of Tobacco Research and, second, if you look at the directors' report of the Council of Tobacco Research, which you also gave me, I think it was appropriate, you will see mention of an abstract of that article.

So that as a double check, it is correct. I could find a citation in the Surgeon General's report, go back to the paper and it says we acknowledge the support of CTR or its predecessor, and then also go to the report of the director, Dr. Little, for this period, under - and in that report, the director abstracts - writes an abstract that they create of the article, and you can cross check that the CTR acknowledges that at least implicitly by saying here is an abstract of the paper we have funded and it comes to 29.

Q And the 38?

A Thirty-eight citations. But I think that is - the answer is 29 different articles, which were cited sometimes more than once for a total of 38 times.

Q And each of those articles was published in the scientific literature at the time?

A Most of them.

Q And were available to anyone interested in that subject matter at the time?

[p. 11654] A Correct.

Q They were part of the state-of-the-art at the time?

A Correct.

*Harris-cross*

Q They were published in abstract form in the annual reports of the scientific director of the Council for Tobacco Research?

A In abstracts written by the director.

Q But the entire articles were also published and in the scientific literature, correct?

A Correct.

Q So anything that was said in the articles was available to any scientist interested in the subject matter?

A A scientist could, in fact, compare the article with the director's report, and later on in fact look and see what the Surgeon General said about the article.

\* \* \*

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(6)  
No. 90-1038

Supreme Court, U.S.

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In The  
**Supreme Court of the United States**  
October Term, 1990

THOMAS CIPOLLONE, individually and as  
Executor of the Estate of Rose D. Cipollone,  
*Petitioner,*

v.

LIGGETT GROUP, INC., a Delaware  
Corporation; PHILIP MORRIS INCORPORATED,  
a Virginia Corporation; and LOEW'S THEATRES,  
INC., a New York Corporation,

*Respondents.*

On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Third Circuit

BRIEF FOR PETITIONER

MARC Z. EDELL  
*Counsel of Record*  
BUDD LARNER  
GROSS ROSENBAUM  
GREENBERG & SADE, P.C.  
*Attorneys for Petitioner*  
150 John F. Kennedy Parkway  
CN 1000  
Short Hills, New Jersey 07078  
(201) 379-4800

ALAN M. DARNELL  
*Of Counsel*  
WILENTZ, GOLDMAN  
& SPITZER, P.C.  
*Attorneys for Petitioner*  
90 Woodbridge Center Drive  
P.O. Box 10  
Woodbridge,  
New Jersey 07095-9811  
(908) 636-8000



## QUESTIONS PRESENTED

1. Does the Federal Cigarette Labeling and Advertising Act, which requires warning labels on cigarette packages, preempt state law tort claims premised on cigarette manufacturers' failure to warn consumers regarding the nature and extent of the health hazards of smoking?

2. Does the Federal Cigarette Labeling and Advertising Act preempt state law intentional tort claims premised on the cigarette manufacturers' intentional deception of consumers regarding the nature and extent of the health hazards of smoking?

## PARTIES

The parties appearing in the United States Court of Appeals for the Third Circuit were Antonio Cipollone, individually and as executor of the estate of Rose D. Cipollone, appellee/cross-appellant below, and three cigarette manufacturers: Liggett Group, Inc. (formerly Liggett & Myers), Philip Morris, Inc., and Loew's Theatres, Inc. (formerly Lorillard), appellants/cross-appellees below.

The petitioner herein, Thomas Cipollone, is the executor of the estate of Rose D. Cipollone and the individual to be substituted as the administrator of the estate of Antonio Cipollone. The respondents are Liggett Group, Inc., Philip Morris, Inc. and Loew's Theatres, Inc.

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## OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 893 F.2d 541 (3d Cir. 1990), and reproduced at Petitioner's Appendix ("Pet. App.") at 1a-93a. A prior opinion of the Court of Appeals, which decided the question of preemption on a certified interlocutory appeal, Pet. App. at 109a-162a, is reported at 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987). The District Court's original preemption opinion, Pet. App. 109a-162a, is reported at 593 F. Supp. 1146 (D.N.J. 1984).

## JURISDICTION

The Court of Appeals denied plaintiff's timely petition for rehearing *en banc* on August 30, 1990. On November 21, 1990, this Court granted petitioner until December 28, 1990 to file a Petition for Writ of Certiorari. Pet. App. 163a. A Petition for Writ of Certiorari was granted on March 25, 1991. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

The federal law in question is the Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282, (hereafter the "Act" or "Labeling Act"), codified as amended at 15 U.S.C. §§ 1331-1340 (1982 & Supp. 1984). As enacted by Congress, the Labeling Act required cigarette manufacturers to place the following warning on cigarette packages beginning on January 1, 1966: "*Caution: Cigarette Smoking May be Hazardous to Your Health.*"<sup>1</sup> In 1970, Congress amended the warning to: "*Warning: The*

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<sup>1</sup> Pub. L. No. 89-92, 79 Stat. 282, *reprinted in* 1965 U.S. Code Cong. & Admin. News 300.

*Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health.*"<sup>2</sup>

The Labeling Act's preamble sets forth the following statement of policy and purpose:

#### DECLARATION OF POLICY

Sec. 2. It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby -

- (1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
- (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.<sup>3</sup>

The original Labeling Act also included the following preemption section:

<sup>2</sup> Pub. L. No. 91-222, 84 Stat. 87, *reprinted in* 1970 U.S. Code Cong. & Admin. News 93. Congress changed the warning requirement again in 1984, Pub. L. No. 98-474, 89 Stat. 2200, but those requirements are not implicated here as Rose Cipollone's lung cancer was diagnosed in 1981. Her claims against defendants are restricted to 1981 and before.

<sup>3</sup> Pub. L. No. 89-92, 79 Stat. 282, *reprinted in* 1965 U.S. Code Cong. & Admin. News 300. These provisions were not changed by the 1970 amendment to the Act.

#### PREEMPTION

Section 5. (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.

(b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Pub. L. No. 89-92, 79 Stat. 282.<sup>4</sup> The preemption provision was amended in 1970 as follows:

(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Pub. L. No. 91-222, 84 Stat. 87 (subsection 5(a) remained unchanged).

The Act contains no provision addressing state law tort claims. It provides no compensation scheme for individuals injured by smoking.

<sup>4</sup> The preemption section also required the Federal Trade Commission ("FTC") to submit periodic reports to Congress on the effectiveness of cigarette labeling, advertising, and promotion. It required the Secretary of Health, Education and Welfare to transmit periodic reports to Congress on the health consequences of smoking and the need for legislation. The section recognized that the Act did not limit the FTC's authority with respect to unfair practices in the advertising of cigarettes and did not affirm nor deny the FTC's holding that it was authorized to require an affirmative statement in cigarette advertising. *Id.*



## STATEMENT OF THE CASE

## A. Proceedings Below

Rose Cipollone and her husband Antonio filed this product liability action seeking damages for injuries suffered as a result of Rose's lifetime of cigarette smoking on August 1, 1983, in the United States District Court for the District of New Jersey.<sup>5</sup> Respondents manufactured the cigarettes Rose Cipollone smoked.

In her complaint, Rose Cipollone alleged that defendants failed to inform consumers adequately of the health risks of smoking, intentionally neutralized the effect of the Congressionally-mandated health warnings through their advertising and public relations campaigns, knowingly misrepresented the health hazards of smoking, and ignored and withheld from the public medical and scientific evidence of the dangers of smoking. Joint Appendix ("J.A.") at 81.

In their answers to the complaint, defendants raised the Labeling Act's preemption provision as an affirmative defense to all plaintiff's post-1965 (post-Labeling Act) claims. Petitioner's Appendix ("Pet. App.") at 113a. Plaintiff moved to strike the preemption defense. *Id.* The district court ruled that the Act did not expressly or impliedly preempt any of Mrs. Cipollone's claims. *Id.* at 160a-161a. The district court certified its preemption decision for interlocutory appeal and the Court of Appeals for the Third Circuit agreed to hear it. *Id.* at 96a.

The Court of Appeals agreed with the district court's conclusion that the Labeling Act's preemption provision did not expressly preempt Mrs. Cipollone's common law tort claims. *Id.* at 102a. The Court of Appeals also agreed that Congress did not entirely "occupy the field" of smoking and health so as to preempt her claims. *Id.* at

<sup>5</sup> After Rose's death in 1984, the third amended complaint was filed to include a wrongful death claim by her husband. J.A. 81. Subsequent to the trial in this matter, Antonio Cipollone died. Their son, Thomas, now prosecutes this case.

104a. However, the court concluded that Mrs. Cipollone's state law tort claims were preempted because they presented an "actual conflict" with the Act. *Id.* at 106a. It held that, though it was not impossible to comply with both the federal law and to pay damages, Mrs. Cipollone's common law tort claims frustrated the purpose of the Act. Therefore, it preempted "those state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes." *Id.* On remand, the trial court interpreted the Court of Appeals' decision as barring Mrs. Cipollone's post-1965 claims for failure to warn, fraudulent misrepresentation, express warranty, and conspiracy to defraud. 649 F. Supp. 664, 675 (1986).

Following a four-month trial, the jury returned a verdict of \$400,000 on Mrs. Cipollone's pre-1966 express warranty claim against Liggett, the manufacturer of the cigarettes she smoked during that period. Pet. App. 3a. The jury also concluded that: Liggett had a duty to warn of the hazards of smoking prior to 1966; Liggett failed to fulfill that duty; and its failure to warn proximately caused Rose Cipollone's lung cancer and death. *See id.* Nevertheless, the jury returned a verdict in Liggett's favor on the failure to warn claim because of its findings on comparative fault. *Id.*

Both sides appealed. The Court of Appeals set aside the verdict and ordered a new trial on certain issues, finding error in the jury instruction on the express warranty claim. *Id.* at 5a. The court recognized the problems engendered by its interlocutory preemption decision, which had created an artificial time constraint on the determination of both causation and liability, and concluded that the "skewed" effect of its ruling warranted a reversal of the jury's comparative fault finding. *Id.* Despite these observations, the panel was compelled to reaffirm the prior interlocutory preemption decision

because of the Third Circuit's internal operating procedures. *Id.* at 88a, n.51. The court also held the preemption bar applied to Mrs. Cipollone's intentional tort claims. The court reasoned such claims would "'challenge . . . the propriety' of [defendants'] 'actions with respect to the advertising and promotion of cigarettes,' " within the meaning of the earlier preemption opinion. *Id.* at 90a.

Chief Judge Gibbons joined the preemption portion of the opinion only because he felt bound by the prior panel's decision. In a concurring opinion, he concluded that the court's original preemption decision was wrong as a matter of law. *Id.* at 92a-93a.

#### B. Rose Cipollone's Lifetime of Smoking

Rose DeFrancesco Cipollone was born in 1925 in Queens, New York, the daughter of Italian immigrants. 683 F. Supp. 1487, 1489 (D.N.J. 1988).<sup>6</sup> Growing up, she went to the movies and idolized the female movie stars, glamorous with their long gowns and cigarettes. She enjoyed "dressing up" like those movie stars, and kept scrapbooks of their pictures, which she snipped from cigarette advertisements. *Id.*; Pet. App. 6a.

Rose began to smoke in 1942, at age 16, imagining herself as part of the sophisticated scenes depicted in cigarette advertisements. It was a "cool, glamorous and grown-up" thing to do. 683 F. Supp. at 1489. She chose Chesterfield cigarettes, made by Liggett & Myers, because she was attracted by the advertisements of movie

<sup>6</sup> The facts contained in this section derive primarily from the trial court's findings of fact on motion for a directed verdict, 683 F. Supp. 1487 (1988), which are restated, in large part, by the Court of Appeals at 893 F.2d 571 (1990) (Pet. App. 1a-93a). The only testimony of Rose Cipollone available to the jury was her deposition, taken by defendants over the course of four days in 1984 when Mrs. Cipollone was dying of lung cancer.

stars and pretty girls smoking Chesterfields, and because the ads stated that the cigarettes were mild, which she understood to mean "safe." *Id.*; Pet. App. 6a. The ads made a lasting impression. Forty years later, she still remembered they claimed Chesterfields "were for ladies." See Pet. App. 7a. By the end of 1943, she was smoking a pack of Chesterfields a day.

Rose read magazines avidly and listened to the radio frequently during these years. *Id.* She especially loved Arthur Godfrey's radio show, which was fully sponsored by Liggett & Myers. *Id.* During the course of these shows, Godfrey endorsed Chesterfield cigarettes in accordance with then current Liggett & Myers' advertising and promotional material. For example, when concerns about the possible relationship between cigarette smoking and lung cancer first appeared in the popular press in 1952, Godfrey responded to these claims for Liggett:

You hear stuff all the time about cigarettes are harmful to you . . . .

Here's an ad. You've seen it in the papers - If you smoke, it will make you feel better . . .

"Nose, throat and accessory organs not adversely affected. First such report ever published about any cigarette . . . . The medical specialist, after a thorough examination of every member of the group stated, 'it is my opinion that the ears, nose, throat and accessory organs of all particular subjects examined by me were not adversely affected in the six-month period by smoking Chesterfield cigarettes provided.'" Now that ought to make you feel better if you've had any worries at all about it. I never did. I smoke two or three packs of these things every day. I feel pretty good. I don't know, I never did believe they did you any harm and now we - we've got the proof. So Chesterfields are the



cigarettes for you to smoke, be they regular size or king size.

Pl. Ex. 2305; Trial Record ("R.") 2349.<sup>7</sup>

Motivated by her desire to smoke a "safe" cigarette, Rose switched in 1955 to the "miracle tip" filter in L&M cigarettes, also manufactured by Liggett. J.A. 131. The L&M ads led her to believe that nicotine and other "bad stuff" would be trapped in the filter. *Id.* She recalled seeing L&M ads that said "doctors recommend you smoke filter cigarettes . . . . I know that through advertising, I was led to assume that they were safe and they wouldn't harm me." J.A. 153. And, in fact, the ads proclaimed, "L&M filters are just what the doctor ordered." 683 F. Supp. at 1490. Many of the ads featured a letter from Dr. Darkis, the Director of Research at Liggett, warranting that the filter used in L&M cigarettes was "entirely harmless to health." Pl. Ex. 2375B; R. 7448.

After the Surgeon General's Report on Smoking and Health was issued in 1964,<sup>8</sup> reports linking smoking with cancer and heart disease began appearing on television and radio. Rose Cipollone did not believe those reports. In her own words, "the government was there and there was no real proof. Tobacco companies wouldn't do anything that was going to kill you so I figured, ah, until they proved it to me to be real, I didn't take it seriously." J.A. 133. Although Rose Cipollone was concerned about her health, she was "sure that if there was anything that dangerous, that the tobacco people wouldn't allow it and the government wouldn't let them do that." J.A. 146. She

<sup>7</sup> Chesterfield magazine ads in the 1950's featured similar copy - "PLAY SAFE, Smoke Chesterfield. . . ." and "Nose, Throat and Accessory Organs not Adversely Affected by Chesterfield. . . ." J.A. 9-10.

<sup>8</sup> *Smoking and Health, Report of the Advisory Committee to the Surgeon General of the Public Health Service*, U.S. Dept. of Health, Education and Welfare (Jan. 11, 1964) (hereafter "1964 Surgeon General's Report").

found support for her belief in the tobacco companies' frequent public statements during this period, which reassured her it had not been proven that cigarette smoking caused lung cancer. Pet. App. 16a.

Impressed by the images of glamorous, liberated women in the Virginia Slims advertisements, Rose switched to Virginia Slims in 1968. *Id.* at 14a. She later switched to Parliaments, because she thought they were safer. *Id.* at 15a. The brand was heavily advertised as lower in tar and nicotine with a recessed filter. The ads led her to believe that if the cigarette company could recess the filter and it would not touch her lips, it was better for her. *Id.* at 15a. In 1974, she switched to True because her family physician recommended them with the admonition "if you are going to smoke, smoke these." She also saw the True ads indicating they were lower in tar and nicotine, and that reinforced her view that they were safe or at least safer. 683 F. Supp. at 1490.<sup>9</sup>

In 1981, Rose Cipollone was diagnosed with lung cancer. She tried unsuccessfully to stop smoking. Even after her lung was removed in 1982, she continued to sneak cigarettes. She died on October 21, 1984.

<sup>9</sup> As Rose Cipollone testified, the industry's affirmations directly influenced her, like millions of smokers, to switch to low tar cigarettes that the manufacturers had led her to believe were "milder" and "safer." J.A. 131; 153. The Federal Trade Commission, charged by Congress with the task of reporting on the effectiveness of the warning label, concluded in its first report in 1967:

[M]any smokers would like to give up the habit, but don't and won't. Some of them have switched to brands that they believe, often erroneously, to be less hazardous . . . . [M]illions of smokers will continue to be deceived by false claims of "mildness" and misleading portrayals of filters.

Federal Trade Commission Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act, June 30, 1967 (hereafter "1967 FTC Report"), at 28.



### C. Cigarette Manufacturers' Efforts to Negate Federal Warning

To appreciate why Rose Cipollone believed what she did about smoking and why she continued to smoke after the federally-mandated warning appeared, her conduct must be seen in the light of the cigarette manufacturers' activities during the same period – much of which was kept from the jury because of the preemption ruling. The only post-1965 internal corporate documents the jury was permitted to consider were those related to pre-1966 activities or the credibility of defendants' witnesses. *See* Pet. App. 4a. Thus, as a direct result of the preemption ruling, the jury heard evidence on both sides of the story until January 1, 1966 (and returned a verdict in the Cipollones' favor based on that evidence), but only heard evidence from the cigarette manufacturers' perspective thereafter. The jury saw only that the warning label was in place and that in the face of it, Rose Cipollone continued to smoke. Evidence of the defendants' sophisticated efforts to undermine the effectiveness of that warning was excluded because of the preemption ruling.

In 1954, faced with the first reports in the popular press linking cigarette smoking and lung cancer, the cigarette industry laid the groundwork for what would later become its response to the federal health warning. At that time, the industry's public relations firm engineered the creation of the Tobacco Industry Research Committee (later renamed the Council for Tobacco Research ("CTR")), a purportedly independent research organization funded by the tobacco industry. The industry promoted the CTR in full page ads in newspapers across the country as its "good faith effort to search for the truth, learn the risk of smoking, and report the findings to the general public." 683 F. Supp. at 1491. However, the defendants' internal documents reflect that CTR was actually created to reassure the public of "the existence of weighty

scientific views which hold that there is no proof that cigarette smoking is a cause of lung cancer." J.A. 13.<sup>10</sup> As one of the defendants' chief executive officers confessed, "CTR is [the] best & cheapest insurance the tobacco industry can buy and without it the Industry would have to invent CTR or would be dead." J.A. 74. Indeed, the organization's scientific veneer was used by the industry to issue public statements countering adverse publicity on smoking and health – including the warnings mandated by Congress. CTR's Scientific Director, Dr. Clarence Cook Little, is quoted in numerous articles espousing the industry's view that no proof existed that smoking caused lung cancer.<sup>11</sup>

In 1970 the industry published CTR-funded research conclusions in major newspapers with a full page advertisement entitled, "After millions of dollars and over 20 years of research: The question about smoking and health is still a question." They reported the results of their "dedicated effort to explore the question of smoking and health" as follows: "So far, in spite of this massive [CTR research] effort, there are eminent scientists who question whether any causal relationship has been proved between

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<sup>10</sup> Attached hereto is an Appendix identifying certain of defendants' employees, trade associations, public relations counsel, and advertising concerns. This appendix is provided to assist the Court in its review of the documents contained in the Joint Appendix.

<sup>11</sup> For example, Dr. Little was quoted in *The New York Times* in 1962 as saying: "Much research reported in the past few years has tended to weaken, rather than to support, the hypothesis that cigarette smoking is a causative factor in lung cancer." Pl. Ex. 9358, R. 12088. *See also* Pl. Ex. 9350, Pl. Ex. 9330 Pl. Ex. 9304, and R. 12088, for other representative statements.

cigarette smoking and human disease – including lung cancer, coronary heart disease, or emphysema.” J.A. 42.

The industry publicly challenged all adverse medical and scientific evidence regarding smoking, irrespective of its truth or validity. The strategy of undermining the scientific community’s claims was formulated even before the scientific evidence became public. The industry had determined that it would attack reports demonstrating the dangers of cigarette smoking and assail the qualifications of the researchers, as necessary. See J.A. 70.

Moreover, the industry advertised its products in order to neutralize the effect of the federally-mandated health warning,<sup>12</sup> and it issued statements denying any link between smoking and lung cancer. J.A. 23, 76. Rose Cipollone believed the press statements and public relations materials issued by the tobacco companies and their trade association denying this causal “link.” J.A. 144. She credited news articles ghost-written by cigarette company employees, claiming that the cigarette-cancer link was “bunk.”<sup>13</sup>

This represents but a small fraction of the evidence reflecting the cigarette industry’s post-1965 efforts to neutralize the government’s undertaking to apprise the public of the health hazards of cigarette smoking, and the

<sup>12</sup> The FTC concluded in 1967 that

the warning label on cigarette packages has not succeeded in overcoming the prevalent attitude toward cigarette smoking through their advertisements, particularly the barrage of commercials on television, which portray smoking as a harmless and enjoyable social activity that is not habit forming and involves no hazards to health.

1967 FTC Report at 28.

<sup>13</sup> See, e.g., headline story in *The National Enquirer*, “Most Medical Experts Say: Cigaret Cancer Link is Bunk-70,000,000 Smokers Falsely Alarmed,” (Mar. 3, 1968) (Pet. App. 227a).

effect of these efforts on Rose Cipollone and the public in general.<sup>14</sup>

## SUMMARY OF THE ARGUMENT

Preemption of traditional state common law tort claims—is an extraordinary occurrence. Rarer still is the preemption of common law personal injury actions where the federal law provides no alternative remedy. In fact, it had never happened until the Court of Appeals’ decision in this case.

The presumption against preemption, frequently articulated and variously described, has served as a gatekeeper for traditional rights and remedies defined by state common law. Congressional intent to override this presumption must be expressed with drastic clarity, especially if preemption would leave a legal vacuum where state common law once stood. The void created here by the Court of Appeals assumes that Congress, without a single word evidencing such intent, left citizens of the several states remediless, and those guilty of tortious conduct shielded by the very Act whose objective they have consistently sought to undermine.

The New Jersey Supreme Court in *Dewey* considered this result antithetical to fundamental principles of federalism and this Court’s preemption jurisprudence. The *Dewey* court concluded that the State’s time-honored authority to provide compensation to its citizens for injuries caused by the wrongdoing of others can not be swept away by the dubious inferences relied on by the Court of Appeals.

<sup>14</sup> Almost without exception, the FTC’s annual reports to Congress regarding the effectiveness of the federal warning concluded that the warnings were ineffective due, in large measure, to the defendants’ advertising practices. These reports were excluded from evidence under the court’s preemption decision.



## ARGUMENT

### INTRODUCTION

Under the Supremacy Clause, state law tort claims may be preempted where: (1) Congress states explicitly in the statute that such claims are displaced ("express preemption"), (2) Congress exclusively occupies a particular field with the intent to supplant such claims ("occupation of the field preemption"), or (3) state law actually conflicts with the federal statute ("actual conflict preemption"). *English v. General Electric*, \_\_\_ U.S. \_\_\_, 110 S. Ct. 2270, 2275 (1990). Because Rose Cipollone's claims do not fall into any of these categories, they are not preempted by the Labeling Act.

The Labeling Act contains no language explicitly preempting state law tort claims. Consequently, every court to consider this issue, including the Third Circuit,<sup>15</sup> has found no express preemption.<sup>16</sup> Because the Act contains

<sup>15</sup> Pet. App. 95a.

<sup>16</sup> Twelve appellate courts – five federal and seven state – have addressed the preemption issue presented here. Their disagreement centers not on express preemption nor on occupation of the field preemption but rather on actual conflict preemption. *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986) (Pet. App. 95a-108a); *Pennington v. Vistrion Corp.*, 876 F.2d 414 (5th Cir. 1989); *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230 (6th Cir. 1988); *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987); *Rogers v. R.J. Reynolds Tobacco Co.*, 557 N.E.2d 1045 (Ind. Ct. App. 1990); *Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655 (Minn. 1989) (reproduced at Pet. App. 164a-180a); *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 577 A.2d 1239 (1990) (reproduced at Pet. App. 181a-226a); *McSorley v. Philip Morris*, No. 536E (N.Y. App. Div. Feb. 4, 1991); *Hite v. R.J. Reynolds Tobacco Co.*, 578 A.2d 417 (Pa. Super. Ct. 1990); *Phillips v. R.J. Reynolds Industries, Inc.*, 769 S.W.2d 488 (Tenn. Ct. App. 1988); *Carlisle v. Philip Morris, Inc.*, 805 S.W.2d 498 (Tx. Ct. App. 1991) (reproduced at Respondents' Appendix ("Resp. App.") 6a-49a).

an express preemption provision that does not explicitly preclude common law tort actions, the preemption inquiry should end, in the absence of a physical impossibility to comply with federal and state law not present here.

It is equally clear that Congress did not intend to occupy the entire field of smoking and health and thereby displace plaintiff's common law tort claims. The Act and its legislative history establish that Congress intended to occupy only the narrow field of affirmative rulemaking with respect to warning labels on cigarette packages and in cigarette advertising.<sup>17</sup> As with express preemption, courts interpreting the Labeling Act have unanimously rejected "occupation of the field" preemption.

The last category, "actual conflict" preemption, has served as the source of disagreement among the courts. Actual conflict occurs (1) where it is physically impossible to comply with both the state and the federal requirements; or (2) where state law stands as an obstacle to the accomplishment of the purposes and objectives of Congress.

As to the physical impossibility prong, cigarette manufacturers have never denied they could pay money damages resulting from these suits as a cost of doing business, raise the price of cigarettes to reflect the true cost of the product, and at the same time comply with the labeling requirements of the Act. The Act also leaves them free to provide additional information regarding the

<sup>17</sup> Congress preempted all state and local action, by statute, ordinance, or pronouncement, with respect to the content of the warning labels. In the interest of simplicity, all these activities are referred to herein, collectively, as "affirmative rulemaking." The 1969 amendment of subsection 5(b) expanded that portion of the field dealing with advertising of cigarettes beyond warning labels to include smoking and health-related affirmative rulemaking in the area of cigarette advertising and promotion.



nature and extent of the health hazards of their products. Indeed, no court has found actual conflict on the basis of physical impossibility.

Courts have parted company on the second prong of the actual conflict test – whether state law tort claims stand as an obstacle to the accomplishment of the two purposes of the Labeling Act. The language of the Act and its legislative history reveal that Mrs. Cipollone's common law tort claims present no obstacle and, in fact, may further the primary purpose of the Act – informing the public of the health hazards of cigarette smoking.

The hypothetical conflict conjured up by the cigarette manufacturers between Mrs. Cipollone's claims and the Act's secondary purpose – avoiding multiplicitous affirmative rulemaking with respect to cigarette warning labels – is legally insufficient to preempt Mrs. Cipollone's post-1965 claims. Further, any tension that may exist between common law tort actions and the Labeling Act was well understood and willingly accepted by Congress. Because Congress was principally attempting to inform the public of the hazards of smoking, only a distorted reading of the Act's secondary purpose could justify a finding of actual conflict preemption.

Defendants' argument that plaintiff's intentional tort claims are preempted ignores the distinction between nonfeasance and misfeasance. Plaintiff's claims are premised not on a breach of duty to act but rather on defendants' volitional acts intended to deceive the public regarding the health hazards of smoking. Defendants suggest that Congress intended to immunize them against the consequences of their intentional conduct designed to undermine the federally-mandated warning. Given the Act's stated purposes, it would be illogical to conclude that Congress contemplated, let alone sanctioned, such a result.

The Court of Appeals' decision in this case and its progeny reject traditional notions of federalism and the

teachings of this Court.<sup>18</sup> Before the decision, federal and state courts universally rejected manufacturers' arguments that compliance with federally-mandated labeling requirements precluded liability under state law in product liability failure to warn actions. After the *Cipollone* opinion, however, courts have split on the issue.<sup>19</sup> *Cipollone* has introduced confusion and engendered muddled thinking about preemption.

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<sup>18</sup> As the New Jersey Supreme Court stated in *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 93-4, 577 A.2d 1239, 1251 (1990) (Pet. App. 207a):

We are persuaded by the view most forcefully stated by Solicitor General Kenneth Starr, in his unpublished monograph "The Law of Preemption," that "[o]ur federal system, with its high regard for the several States' powers of governance, requires that judges not preempt state laws lightly." *Id.* at 61. Judge Starr recalls Justice Frankfurter's observation that when the Supreme Court considers whether the Congress has preempted state law, "[a]ny indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority." *Id.* at 86 [quoting *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 780 (1947)].

<sup>19</sup> See Petition for Writ of Certiorari at 20.

## POINT I

## CONGRESS DID NOT EXPRESSLY PREEMPT ROSE CIPOLLONE'S COMMON LAW TORT CLAIMS

Congress did not leave to speculation the preemptive scope of the Labeling Act. It specified in plain unmistakable terms exactly what the Act preempts. The preemption section does not mention or address common law tort claims. Indeed, every court to examine the Act has found no ambiguity in the statutory text and has concluded that state common law tort claims are not expressly preempted. Yet defendants, undaunted by the reality of the language of the Act, have attempted to force it to say what it does not.

There is no doubt that Congress may expressly preempt state law through a federal act by explicitly voicing its desire to do so. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). However, such "express preemption" must be unmistakably clear from the language of the federal act. Where the statute's language is plain, the function of the court is to enforce it according to its terms, without resorting to evidence beyond the words of the statute. *West Virginia University Hospitals, Inc. v. Casey*, \_\_\_ U.S. \_\_\_, 111 S. Ct. 1138, 1147-48 (1991). Statutes in derogation of the common law are disfavored, strictly construed, and any ambiguity must be read to avoid repeal of the common law. See Sands, 2A *Sutherland Statutory Construction* § 47.24 at 203 (1973) and cases cited therein.

Congress amended the Labeling Act and its preemption provision in 1969. The statutory analysis, therefore, must be divided into two time frames. The first begins with the effective date of the Act, January 1, 1966, and ends on July 1, 1969, the effective date of the first amendment. During those years, the Act provided:

## PREEMPTION

Sec. 5. (a) No statement relating to smoking and health, other than the statement required by

section 4 of this Act [the warning label], shall be required on any cigarette package.

(b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Pub. L. No. 89-92, 79 Stat. 282. Section 5(a) plainly means that no other governmental entity may require additional warning language on cigarette packages. Section 5(b) plainly means that no other governmental entity may require any warning language in cigarette advertising.<sup>20</sup>

The question then becomes: What state action *requires* cigarette manufacturers to include specific additional health warnings on cigarette packages or in cigarette advertising? The answer to this question must proceed from an understanding of what the word "require" means. It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted according to their common meaning. *Perrin v. United States*, 444 U.S. 37, 42 (1979). Because "require" is not defined in the Act, it must be interpreted in its plain, ordinary sense. *Black's Law Dictionary* defines "require" as "[t]o direct, order, demand, instruct, command, claim, compel, request, need, exact." It is not defined as "to influence, induce, motivate, persuade, or incline," any of which might arguably describe the ancillary effect of a successful tort suit. The element of compulsion serves as the definitional boundary between these two categories.

State requirements command specific conduct, leaving no lawful alternative other than to comply. One who fails to follow such a requirement breaks the law. It matters little which governmental institution issues the requirement. An injunction issued by a court of law may command the same specific behavior as a statutory

<sup>20</sup> Neither section curtailed cigarette manufacturers' freedom to speak further on the issue of smoking and health, which indeed they did.



provision. Failure to comply with either edict results in criminal or civil penalty. The key is that neither allows any option other than to comply with the prescribed conduct. Therefore, any state statute, injunction, or executive pronouncement compelling cigarette manufacturers to place an additional health warning on cigarette packages and in cigarette advertising would be a "requirement" Congress explicitly preempted.

In contrast, common law product liability lawsuits do not compel specific behavior. Such lawsuits operate primarily to compensate injured individuals; they do not regulate. See generally W.P. Keeton, D. Dobbs, R. Keeton, D. Owen, *Prosser and Keeton on the Law of Torts* 5-6 (5th ed. 1984). They derive from the state policy determination that, as between the manufacturer and the injured user, the manufacturer is better situated to absorb the cost of injury and to build it into the price of the product.<sup>21</sup> Damage awards in product liability suits do not compel any behavior other than the payment of money damages. Cigarette manufacturers are free to build these damage awards into the price of their product and do nothing else or, alternatively, they may with unconstrained choice

<sup>21</sup> The New Jersey Supreme Court has consistently expressed its concern for the protection of the consumer through the allocation of risk of injury. In *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. 191, 205, 447 A.2d 539, 547 (1982), the court noted:

One of the most important arguments generally advanced for imposing strict liability is that the manufacturers and distributors of defective products can best allocate the costs of the injuries resulting from those products. The premise is that the price of a product should reflect all of its costs, including the cost of injuries caused by the product.

See also *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 91, 577 A.2d 1239, 1249-50 (1990) (Pet. App. 203a) (strong State interest in compensating those injured by manufacturers' products through state common law tort claims).

attempt to reduce the likelihood of future adverse verdicts.<sup>22</sup>

Defendants attempt to expand the explicit language of the preemption section to include Rose Cipollone's common law tort claims. As the defendants see it, her claims are expressly preempted by the Act. The catalyst for their argument is the language in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959), where the Court noted that damage awards may have an ancillary regulatory effect. Defendants assert that Rose Cipollone's claims have the regulatory effect of requiring additional language on packages of cigarettes and in cigarette advertising. This argument fails for several reasons. First, this Court has recently concluded that decisions construing the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.*, such as *Garmon*, have no precedential value in construing the preemptive effect of unrelated federal acts. *English v. General Electric Co.*, \_\_\_ U.S. \_\_\_, 110 S. Ct. 2270, 2279 n.8 (1990).<sup>23</sup> Second, their

<sup>22</sup> The Labeling Act left cigarette manufacturers free to provide additional health information to their consumers in numerous ways. They could include additional statements or symbols on cigarette packaging and in advertising; include inserts in cigarette packages; provide warning signs for use in places of sale and distribution; provide their consumers with pamphlets or other educational materials on the hazards of smoking; communicate the hazards to their consumers through the media in public interest announcements or "advertorials"; or modify their advertising and public relations to reflect the message conveyed by the health warning instead of to refute it. The cigarette industry could even petition Congress to change the language of the warning.

<sup>23</sup> Defendants' reliance on *Garmon* is also misplaced for several other reasons. First, *Garmon* did not involve a question of express preemption but rather one of implied preemption. Second, the case did not involve the preemption of state common law claims but rather state statutory provisions. 359 U.S.

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argument ignores the plain meaning of the words used by Congress. Third, it disregards the fact that if Congress, well aware of the existence of claims like Rose Cipollone's,<sup>24</sup> had intended to preempt them expressly, "it knew how to do so with unmistakable specificity," but it chose not to. *Dewey*, Pet. App. 207a. Fourth, the type of common law tort actions at issue do not "require" cigarette manufacturers to do anything other than to pay money damages.

The second time frame in question begins on July 1, 1969, the effective date of the amended preemption provision, and ends in 1981 when Mrs. Cipollone's cancer was diagnosed. During this period the applicable preemption provision read:

#### PREEMPTION

Sec. 5. (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.

(b) No requirement or prohibition based on smoking and health shall be imposed under State

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at 239. Third, although the Court concluded that the damage award under consideration was preempted by the NLRA, it recognized that "[i]t may be that an award of damages in a particular situation will not, in fact, conflict with the active assertion of federal authority." *Id.*, at 247. Fourth, the Court stressed that with respect to the NLRA, unlike the Labeling Act, Congress did not foresee the difficulties created by the co-application of federal and state law. *Id.*, at 239-240. Fifth, unlike the Labeling Act, the NLRA grievance procedure provided an alternative remedy to the injured party. Sixth, the *Garmon* analysis has fallen into disfavor. See e.g., *Farmer v. United Brotherhood of C.&J. of America*, Local 25, 430 U.S. 290, 302 (1977) ("inflexible application of the [*Garmon*] doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme.").

<sup>24</sup> See *infra* note 41.

law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Pub. L. No. 91-222, 84 Stat. 87.

Section 5(a) remained unchanged and only preempted other governmental entities from requiring additional warning language on packages of cigarettes. Amended section 5(b) expressly preempted states and their political subdivisions from imposing any requirements or prohibitions based on smoking and health in cigarette advertising and promotion. States remained free to effect the same traditional "police regulation" they could under the original Act.<sup>25</sup> Cigarette manufacturers still remained free to say more about the hazards of cigarettes, and they did. See, e.g., *J.A.* 42, 72.

The purpose of this "perfecting amendment" was simply to clarify that state administrative agencies, counties, and municipalities continued to be preempted from imposing requirements or prohibitions.<sup>26</sup> Again, the preempted

<sup>25</sup> See S. Rep. No. 566, 91st Cong., 2d Sess. 4, reprinted in 1970 U.S. Code Cong. & Admin. News 2652, 2655:

[The Act] would in no way affect the power of any State or political subdivision of any State with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or similar police regulations. It is limited entirely to State or local requirements or prohibitions in the advertising of cigarettes. . . .

<sup>26</sup> See Conf. Rep. No. 897, 91st Cong., 2d Sess. 2, reprinted in 1970 U.S. Code Cong. & Admin. News 2676, 2677:

In some instances, counties or municipalities exercise their authority over advertising by local ordinances, or regulations, or even occasionally by resolution. In order to avoid the chaos created by a multiplicity of conflicting regulations, however, the bill preempts State requirements or prohibitions with respect to the advertising of cigarettes based on smoking and health. This preemption is intended to include not only action by State statute but by all other administrative actions or local ordinances or regulations by any political subdivision of any State. . . .

"requirement" is compelling particular behavior. "Prohibition" is nothing more than the flip side of "requirement," proscribing certain behavior as opposed to demanding it. The net result is the same. Rose Cipollone's common law tort claims do not impose prohibitions any more than they impose requirements.

In an attempt to construct their express preemption argument, defendants seize on the phrase "state law," incorporated in amended subsection 5(b), and define it to include "state common law tort actions." They then join "state common law tort actions" with their misconceived *Garmon* "regulation" argument and declare – express preemption. Such linguistic alchemy cannot transform the explicit language of the Act to suit cigarette manufacturers' needs. Such reading into the statute to bring about an end not specified by the legislation has been repeatedly rejected by this Court. See, e.g., *West Virginia University Hospitals, Inc. v. Casey*, \_\_\_ U.S. \_\_\_, 111 S. Ct. 1138, 1148 (1991) (quoting *Iselin v. United States*, 270 U.S. 245, 250-251 (1926)):

[The statute's] language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.

When Congress expresses its intent to preempt state law in a federal act and a determination is made that the state law in question does not fall within the proscribed area, the preemption question is resolved. There is no need to infer intent. See *California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272, 281 (1987). Congress has spoken in the Labeling Act and has done so clearly. The Court need look no further.

## POINT II

### CONGRESS DID NOT INTEND TO PREEMPT ROSE CIPOLLONE'S COMMON LAW TORT CLAIMS BY "OCCUPATION OF THE FIELD"

The second way Congress may preempt state law is by occupation of a field, which may be discerned either by a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" or a "federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The Court will not lightly infer federal occupation of a field. Federal regulation of a field of commerce does not preempt state regulatory power unless "the nature of the regulated subject matter permits no other conclusion, or . . . Congress has unmistakably so ordained." L. Tribe, *American Constitutional Law* § 6-27 at 497 (2d ed. 1988) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)).

Because Congress can explicitly preempt state law when it chooses to do so, this Court has been circumspect in finding preemption when Congress does not clearly address the issue. As a general proposition, unless necessary, "Congress [does] not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). This Court has been particularly adverse to extending preemption where state law involves traditional state interests.

Therefore, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230. This heightened presumption against preemption exists because it encompasses actions that lie in fields traditionally occupied by the states. *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 144. Historically, the states have been entrusted with defining and redressing injuries arising from their citizens' failure to conform their behavior to societal standards of right and wrong. See *English v. General*



*Electric Co.*, \_\_\_ U.S. \_\_\_, 110 S. Ct. 2270, 2277 (1990). This right to redress lies at the heart of our nation's civil, moral and judicial system. As Chief Justice Marshall explained, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162 (1803). See also *Cipollone*, 593 F. Supp. at 1153 (Pet. App. 121a-122a) ("Torts, such as those alleged here, are precisely the sort of legal action that falls within the scope of a state's historical and prototypical powers.") (citing *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1542 (D.C. Cir.), cert. denied, 469 U.S. 1062 (1984); *Feldman v. Lederle Laboratories*, 97 N.J. 429, 462, 479 A.2d 374 (1984)).

The Court has never countenanced implied preemption of state common law tort claims where to do so would leave injured persons without a remedy.<sup>27</sup> The

<sup>27</sup> See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 249, 251 (1984) (holding Atomic Energy Act did not preempt state law punitive damages action against nuclear facility where federal act did not provide for compensation for injured workers. "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct"); *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (refusing to preempt certain property owners' tort remedies despite defendants' compliance with Clean Water Act in order not to leave property owners without a remedy); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (rejecting preemption of Indian common law claims for fair rental value of land where to do otherwise would leave them remediless); *United Construction Workers v. Laburnum Construction Co.*, 347 U.S. 656, 663-64 (1954) (declining to preempt state law tort claims in heavily regulated labor relations field because to do so would deprive plaintiff of property without recourse or compensation). Cf. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959) (preempting state law claims but emphasizing availability of alternate remedy under NLRA).

philosophy underlying this reluctance to preempt state remedies where no federal remedies exist was summarized by Justice Blackmun in *Silkwood v. Kerr-McGee Corp.*:

Because the Federal Government does not regulate the compensation of victims, and because it is inconceivable that Congress intended to leave victims with no remedy at all, the pre-emption analysis established by *Pacific Gas* comfortably accommodates – indeed it compels – the conclusion that compensatory damages are not preempted. . . .

464 U.S. at 263-4 (dissenting on punitive damages issue) (citations omitted).

The Labeling Act provides no alternative compensation scheme. Given the strong presumption against preemption – stronger still where victims are deprived of traditional state remedies – it is inaccurate and uncharitable to assume that Congress would, without comment, eliminate vital state law claims and immunize cigarette manufacturers against the consequences of their tortious conduct.

#### A. Congress Intended to Occupy Only the Narrow Field of Affirmative Rulemaking With Respect to Warning Labels on Cigarette Packages and In Cigarette Advertising

The Labeling Act and its legislative history establish that Congress intended to occupy the narrow field of affirmative rulemaking with respect to health warnings on cigarette packages and in cigarette advertising. This field was expanded by the 1969 amendment of preemption subsection 5(b) to include smoking and health-motivated rulemaking with respect to cigarette advertising and promotion generally. Neither the Act nor its legislative history suggests that Congress even considered preempting common law tort claims when it enacted or amended the Act. An examination of the genesis of the Labeling Act is instructive on this point.



Although there had been sporadic interest in the late 1950's and early 1960's by various states to require health warnings on cigarette packages,<sup>28</sup> it was not until the release of the 1964 Surgeon General's Report<sup>29</sup> that states and federal agencies focused on the health hazards of smoking and the need to advise the public of those hazards. On January 17, 1964, the FTC proposed a Trade Regulation Rule requiring manufacturers to place a health warning on all packages of cigarettes and in all cigarette advertisements.<sup>30</sup> At the same time, states

<sup>28</sup> E.g., Mass. H. 2078, 160th General Court, 2d Sess. (1958); Mo. H.B. 329, 70th General Assembly, 1st Sess. (1959); Neb. L.B. 368, 73rd Leg. (1963); N.M. S. 57 26th Leg. (1963); N.Y. A. 2909, 183rd Annual Sess., Leg. (1960); Pa. S. 1137, 143rd General Assembly (1959); S.C. H. 1740, 95th General Assembly, 1st Sess. (1963).

<sup>29</sup> The report concluded: "Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." H.R. Rep. No. 449, 89th Cong., 1st Sess., 2 reprinted in 1965 U.S. Code Cong. & Admin. News 2351. Specifically, the report found that smoking was related to lung cancer, chronic bronchitis, emphysema, cardiovascular diseases, and cancer of the larynx. 1964 Surgeon General's Report, at 31-32.

<sup>30</sup> The FTC concluded that the absence of accurate health information in cigarette ads rendered those ads false and/or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. See 29 Fed. Reg. 8324 (1964), 29 Fed. Reg. 530 (1964). The proposed rule would have required the following warnings:

- a. CAUTION - CIGARETTE SMOKING IS A HEALTH HAZARD: The Surgeon General's Advisory Committee on Smoking and Health has found that cigarette smoking contributes substantially to mortality from certain specific diseases and to overall death rate; or

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concerned with the health and safety of their citizens proposed or adopted mandatory warning label requirements for cigarette packages. See, e.g., 1965 N.Y. Laws Ch. 470 (requiring label stating: "Warning: Excessive Use Is Dangerous to Health").

In the wake of this activity, Congress turned its attention to the cigarette smoking and health issue. Primarily, it was concerned with advising the public that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on cigarette packages. Congress also recognized, however, that diverse labeling requirements could impede the national economy. Therefore, it reserved to itself the exclusive authority to enact legislation specifying the language to be included in the warning label on cigarette packages.

That Congress was thinking only in terms of preempting affirmative rulemaking is reflected throughout the Congressional record.<sup>31</sup> All discussions of preempted

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- b. CAUTION: Cigarette smoking is dangerous to health. It may cause death from cancer and other diseases.

<sup>31</sup> For example, Congressman Fountain of North Carolina declared:

[T]he problem here and the facts are so obvious - with every state and probably many municipalities passing different regulations requiring the manufacturers of cigarettes to have different labels on packages going into different States and areas - that the situation would become intolerable and so confusing and so frustrating to all concerned that the entire tobacco industry might be destroyed. For these reasons I believe in the doctrine of preemption in this particular situation.

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activity were couched in terms of "passing bills," "passing laws," "pending bills" and "passing regulations."<sup>32</sup> This view was also shared by the cigarette companies.<sup>33</sup>

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Cigarette Labeling and Advertising: Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 643, 1237, 3055 and 6543, 91st Cong., 1st Sess., 30 (1969) (hereafter "1969 House Hearings").

<sup>32</sup> See, e.g., 1969 House hearings at 30 (discussing "laws" and "regulations"); *Id.* at 554 (discussing "bills pending before State legislatures"); H.R. Rep. No. 449, 89th Cong., 1st Sess., 3, reprinted in 1965 U.S. Code Cong. & Admin. News 2350, 2352 (discussing "a multiplicity of State and local regulations potentially creating chaotic marketing conditions and consumer confusion").

<sup>33</sup> Bowman Gray, Chairman of the Board of R. J. Reynolds Tobacco Company and Chairman of the Executive Committee of the Tobacco Institute, testified before Congress as to the industry's understanding of the preempted "field." He argued that "any such legislation should make absolutely clear that the Congressional statute preempts the field . . . . It would be intolerable if the state and federal agencies were to remain free to pass conflicting laws or to impose conflicting regulations on this subject." Cigarette Labeling and Advertising: Hearings before the Committee on Commerce, United States Senate, on S. 559 and S. 547, 89th Cong., 1st Sess., 246 (1965). Significantly, the cigarette industry's spokesman did not include state law tort claims in his list of "intolerables."

The tobacco industry reconfirmed its understanding during Congressional hearings on the 1969 amendments to the Act. Joseph F. Cullman III, Chairman of the Board of Directors and Chief Executive Officer of Philip Morris, Inc. and then Chairman of the Executive Committee of the Tobacco Institute, testified on the preemption issue. His ultimate concern was that "if Congress does not extend [the preemption provision] there will be piecemeal and conflicting Federal and State regulations in this field." 1969 House Hearings at 554.

Additional indicia that the preempted field is a narrow one derives from the extensive regulation of cigarettes by states and federal agencies in areas that clearly relate to smoking and health. For example, state and local governmental bodies regulate the sale of cigarettes to minors,<sup>34</sup> the sale of cigarettes in vending machines,<sup>35</sup> the use of cigarettes in public places and in places of business,<sup>36</sup> and the promotional activities of cigarette manufacturers.<sup>37</sup> States also impose taxes on cigarettes, and earmark the proceeds for public interest anti-smoking campaigns.<sup>38</sup>

<sup>34</sup> E.g., Iowa Code Ann. § 98.2 (1984 & Supp. 1991); Ala. Code § 13A-12-3 (1982 & Supp. 1990); Ind. Code Ann. § 35-46-1-10 (West 1986 & Supp. 1990); N.H. Rev. Stat. Ann. § 78:12-b (Supp. 1990); Minneapolis, Minn., Code tit. 13, ch. 281, § 281.50 (1990); Gillette, Wyo., Code § 14-39 (1990).

<sup>35</sup> E.g., Colo. Rev. Stat. § 18-13-121(4)(a) (Supp. 1990); Me. Rev. Stat. Ann. tit. 22, § 1628 (Supp. 1990); Ga. Code Ann. § 16-12-173 (1988); Idaho Code § 18-1503 (1987); Mora, Minn., Municipal Code ch. 108, § 108.005 (1990).

<sup>36</sup> E.g., Fla. Stat. Ann. § 386.201-.209 (1986 & Supp. 1991); N.J. Stat. Ann. § 26:3D-1 to 54 (West 1987 & Supp. 1990); Me. Rev. Stat. Ann. tit. 22, §§ 1578, 1578-A, 1579-A (Supp. 1990); San Luis Obispo, Cal., Ordinance 1172 (1990); Snowmass Village, Colo., Code ch. 10, art. 6, §§ 6-1 to -10 (1989).

<sup>37</sup> E.g., Minn. Stat. § 325F.77(3)-(4) (1990) (promotional distribution of tobacco products); Gillette, Wyo., Code § 14-39 (1990) (distribution of tobacco products to minors); Minneapolis, Minn., Code tit. 13, ch. 281, § 281.55 (1990) (distribution of free tobacco); Bowie, Md., Code § 18.13 (1986) (distribution of free tobacco products on public property); Boston, Mass., Code § 16-2.3 (1984) (distribution of tobacco products in public places).

<sup>38</sup> E.g., Cal. Rev. & Tax Code §§ 30001, 30121-30130 (Supp. 1991); Cal. Health & Safety Code §§ 24160-24169.8 (Supp. 1991). This tax will raise \$650 million annually to be used for the State's smoking and health education program. These revenues could as easily be placed in a fund to compensate smokers for smoking-related diseases.



Indeed, states may be free to ban the sale of cigarettes altogether. See *Posadas de Puerto Rico Ass'n v. Tourism Co.*, 478 U.S. 328, 346-47 (1986). Surely, such wide latitude would not be enjoyed by the states if Congress intended to occupy the entire field of cigarette smoking and health.

When the federal government completely occupies a given field or an identifiable portion of it, "the test [of preemption] is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 236. To the extent it is, the federal scheme will prevail. In this case, the federal government does not regulate the compensation of persons injured by cigarettes at all. Under the *Rice* analysis, therefore, actions for compensation based on state common law are outside the prohibited zone.

#### B. The Labeling Act's Legislative History Reflects Congress' Intent That Common Law Tort Actions Would Continue

Further evidence that Congress intended to occupy only the narrow field of affirmative rulemaking is found in specific references to tort actions in the Labeling Act's legislative history, which reflect Congress' expectation that traditional state law tort actions would continue. The assumption that such actions would coexist with the federal regulation was well recognized, frequently articulated, and never doubted.

Cigarette smokers had been bringing state law tort suits against cigarette companies for failure to warn and deceptive advertising for many years prior to Congress' decision to enact the Labeling Act.<sup>39</sup> Members of Congress were well aware of this and, although they

<sup>39</sup> These cases date back to 1954. See, e.g., *Green v. American Tobacco Co.*, 409 F.2d 1166 (5th Cir. 1969), cert. denied, 397 U.S.

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anticipated the Act might have some effect on these cases, they expected these cases to continue.<sup>40</sup>

The Act's legislative history is replete with discussions of how the Act might affect cigarette litigation.<sup>41</sup>

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911 (1970); *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479 (3d Cir. 1965), cert. denied, 382 U.S. 987 (1966); *Ross v. Philip Morris & Co.*, 328 F.2d 3 (8th Cir. 1964); *Green v. American Tobacco Co.*, 325 F.2d 673 (5th Cir. 1963), cert. denied, 377 U.S. 943 (1964); *R. J. Reynolds Tobacco Co. v. Hudson*, 314 F.2d 776 (5th Cir. 1963); *Lartigue v. R. J. Reynolds Tobacco Co.*, 317 F.2d 19 (5th Cir.), cert. denied, 375 U.S. 865 (1963); *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962); *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961); *Cooper v. R. J. Reynolds Tobacco Co.*, 256 F.2d 464 (1st Cir.), cert. denied, 358 U.S. 875 (1958); *Cooper v. R. J. Reynolds Tobacco Co.*, 234 F.2d 170 (1st Cir. 1956); *Albright v. R. J. Reynolds Tobacco Co.*, 350 F. Supp. 341 (W.D. Pa. 1972), aff'd, 485 F.2d 678 (3d Cir. 1973), cert. denied, 416 U.S. 951 (1974); *Fine v. Philip Morris, Inc.*, 239 F. Supp. 361 (S.D.N.Y. 1964); *Green v. American Tobacco Co.*, 154 So. 2d 169 (Fla. 1963), cert. denied, 377 U.S. 943 (1964); *Mitchell v. American Tobacco Co.*, 183 F. Supp. 406 (M.D. Pa. 1960).

By 1965, this Court had denied petitions for certiorari in three of these cases: *Pritchard v. Liggett & Myers, Inc.*, *Green v. American Tobacco Co.*, and *Cooper v. R. J. Reynolds Tobacco Co.*

<sup>40</sup> As this Court observed in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 249, 254 (1984), with reference to the legislative history pertinent there, "the importance of the legislation for present purposes is not so much in its substance, as in the assumptions on which it was based."

<sup>41</sup> An example is the colloquy between Congressman Springer of Illinois, Member of the Committee on Interstate Commerce, and Congressman Fascell of Florida in the floor debate on the proposed Act:

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Questions regarding the effect the warnings would have on state law causes of action and defenses only make

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MR. FASCELL: Is there any legal significance either for the manufacturer or user by way of presumption or otherwise because this warning is placed by law on a package of cigarettes?

MR. SPRINGER: For injury?

MR. FASCELL: Yes.

MR. SPRINGER: I do not believe there is anything in this bill that would have anything to do with what the gentleman from Florida suggests.

MR. FASCELL: If a smoker is injured as a result of smoking, and there is a warning required by law that smoking may be injurious to health, does that waive or create a legal presumption or defense in a personal injury suit because of the use of the article notwithstanding the warning?

MR. SPRINGER: I am not sufficiently a lawyer in Federal Trade Commission practices to be able to advise the gentleman.

MR. FASCELL: The legislative record makes it clear that passage of this law and compliance by the manufacturer in no way affects the right to raise the defense of an "assumption or [sic] risk" and the legal requirement for such a defense to prevail; nor does it shift the burden of proof, nor could it be considered a legal or factual bar to the plaintiff user.

111 Cong. Rec. 16,543-44 (1965).

A similar discussion transpired between Mr. Theodore Ellenbogen, Acting Assistant General Counsel to the Department of Health, Education and Welfare, and Mr. James A. Mackay, Congressman from Georgia and Member of the Committee on Interstate and Foreign Commerce, in the 1965 hearings:

MR. MACKAY: I would like to ask you this as a lawyer. Would not the presence of the type of

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sense if Congress did not intend to preclude state law tort actions. Even the tobacco industry readily acknowledged the Act would not immunize it from state law tort claims.<sup>42</sup>

(Continued from previous page)

warning suggested in these bills greatly strengthen the hand of a defendant in a tort case?

MR. ELLENBOGEN: In the long run it might do so, because those cases that I have read - and I have not made a real study of this particular thing - but the *Green [v. American Tobacco]* case, for example, is based, I believe, on the implied warranty of fitness, and there being no notice of the health hazard to the consumer.

Cigarette Labeling and Advertising: Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 2248, 3014, 4007, 7051, and 4244, 89th Cong., 1st Sess., 176 (1965). Mr. Ellenbogen considered such suits "a private matter [that] would not be regulated by [the Act]." *Id.*

<sup>42</sup> During the 1969 hearings, Joseph F. Cullman III of Philip Morris testified:

MR. MOSS (Congressman, State of California): You stated that [the Act] had two principal objectives in your statement on page 14, first to inform the public concerning smoking and health, and second, to protect commerce against diverse, nonuniform and confusing, et cetera, requirements. Wasn't there a third advantage also realized, that of relieving the cigarette manufacturers of liability which might arise from a directly traceable illness to smoking by a person who smoked notwithstanding that warning? . . .

MR. CULLMAN: I would answer that in the negative, and say that that was not part of our objective in any way.

(Continued on following page)

Congressional debate over the impact of the warning on state common law tort actions evidences Congress' intent not to displace these actions. The entire legislative history of the Act and its amendment contain not a whisper to the contrary.

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(Continued from previous page)

MR. MOSS: Was it a fringe benefit?

MR. CULLMAN: I don't see that it was. We have been involved in litigation long before that, . . .

MR. WATSON (Congressman, State of South Carolina): Assuming just a little further the line of questioning of my friend from California, *nowhere in the Act of 1965 does it preclude an individual or prevent an individual from pursuing a common-law liability claim against any tobacco company so far as I know, and if the gentleman from California is aware of anything to the contrary, he should present it.*

1969 House Hearings at 577-79 (emphasis added).

### POINT III

#### ROSE CIPOLLONE'S COMMON LAW TORT CLAIMS DO NOT ACTUALLY CONFLICT WITH THE LABELING ACT

This Court has identified two narrow and specific categories of "actual conflict" preemption: (1) where it is physically impossible to comply with both the state and federal law, and (2) where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Maryland v. Louisiana*, 451 U.S. 725, 747 (1981). Without question, it is not physically impossible for cigarette manufacturers to comply with the Act and to pay common law tort damages. No manufacturer has ever claimed the contrary. With respect to whether state law tort claims stand as an obstacle to the accomplishment of the Act's purposes and objectives, Rose Cipollone's claims can only further the Labeling Act's informational goal and will not frustrate its objective to avoid multiple labeling and advertising requirements.

#### A. Purposes and Objectives of the Act

The threshold question in any conflict analysis is a determination of the purpose of the federal legislation. The Labeling Act's two articulated purposes are that:

- (1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
- (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

Pub. L. No. 89-92, 79 Stat. 282.

As the plain language of the statute indicates, Congress did not assign these dual purposes equal weight. The purpose of avoiding diverse labeling requirements and thereby protecting commerce was secondary to the primary purpose of disseminating health information. As described in the House Report accompanying the 1965 Act, "[t]he *principal* purpose of the bill was to provide adequate warning to the public of the potential hazards of cigarette smoking by requiring the labeling of cigarette packages." H.R. Rep. No. 449, 89th Cong., 1st Sess. 1, reprinted in 1965 U.S. Code Cong. & Admin. News 2350 (emphasis in original). Congress' interest in protecting commerce rises only "to the maximum extent consistent" with the goal of adequately informing the public of the health hazards of smoking.

This balance of purposes provides an even more compelling argument for rejecting preemption than did the balance of purposes weighed in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), where this Court held the Atomic Energy Act did not preempt a state common law tort action seeking punitive damages for a worker injured at a federally regulated and licensed nuclear plant. The primary purpose of the Atomic Energy Act was to promote nuclear power – not to protect the health and safety of the public. *Id.* at 257. Even so, the Court observed that "the promotion of nuclear power is not to be accomplished 'at all costs' " but "only to the extent it is consistent 'with the health and safety of the public.' " *Id.* (citing the applicable statute and *Pacific Gas & Electric v. State Energy Resources Conservation Commission & Development*, 461 U.S. 190, 222 (1983)).

In contrast to the Atomic Energy Act, the primary goal of the Labeling Act is to inform the public of the health hazards associated with smoking. Congress did not intend "to curtail the potential flow of information lest the public learn too much about the hazards of smoking for the good of the tobacco industry and the economy." *Banzhaf v. F.C.C.*, 405 F.2d 1082, 1089 (1968), cert.

denied, 364 U.S. 842 (1969) (construing preemption provision of Labeling Act).

**B. Common Law Tort Claims Will Further, Rather Than Conflict With, the Primary Purpose of the Act – Informing the Public About the Health Hazards of Cigarette Smoking**

To the extent they have any effect at all, Mrs. Cipollone's state law tort claims will only serve to promote the Act's main objective. Conceivably, such actions might encourage cigarette manufacturers to provide more information to the public regarding the health hazards of cigarettes, to present the information in an effective form, or to communicate more truthfully with the public.

Conversely, preemption of state law tort claims would undermine the Act's informational goal and eliminate any incentive for the cigarette companies to disseminate truthful information to the public regarding the nature and extent of the health consequences of cigarette smoking. Preemption would permit the cigarette manufacturers to "deny or refute the risks of cigarette smoking with impunity and immunity so long as the little rectangle with the necessary language appears in its advertising and on its cigarette packages." *Cipollone*, 649 F. Supp. 664, 667 (D.N.J. 1986).

For example, cigarette manufacturers could incorporate known carcinogenic materials in their products without warning consumers, and yet enjoy total immunity from liability for the harm they know will result.<sup>43</sup> They could discover a causal link between their products and previously unknown but serious diseases, withhold the information and, again, remain unaccountable. They

<sup>43</sup> For years after the Act was passed, DDD and other harmful pesticides were knowingly incorporated in cigarettes, and yet the manufacturers did nothing to warn consumers. J.A. 187-89.



could devise public relations plans and advertising campaigns to overcome the effectiveness of the federally-mandated warning, all without liability. Unfortunately, these images reflect reality.<sup>44</sup> That being the case, a preemption shield guaranteeing defendants' continued ability to act with immunity directly contravenes the Act's main objective.

**C. Common Law Tort Claims Do Not Actually Conflict With the Secondary Purpose of the Act – Avoiding a Multiplicity of Labeling Requirements**

**1. It is Not Impossible for Defendants to Comply With the Labeling Act and to Pay Money Damages**

As noted, one of the tests for determining whether an actual conflict exists is whether it is impossible to comply with both the federal and state law. Compliance by defendants with both the labeling requirements of the Act and state common law damage awards is not a physical impossibility. As Justice Blackmun stated in *Silkwood*, "[w]hatever compensation standard a State imposes, whether it be negligence or strict liability, a [defendant] remains free to continue operating under federal standards and to pay for the injury that results. This presumably is what Congress had in mind when it preempted state authority to set administrative regulatory standards but left state compensatory schemes intact." 464 U.S. at 264 (dissenting on punitive damages issue). That was true in regard to nuclear energy. It is equally true here. The imposition of tort liability on cigarette manufacturers would leave them with a multitude of affirmative choices,<sup>45</sup> in addition to the option of doing nothing other than paying damage awards.

<sup>44</sup> See, *infra* Point IV.

<sup>45</sup> See *supra* note 22.

**2. The Hypothetical Conflict Asserted by Defendants is Insufficient to Preempt Common Law Tort Claims**

This Court has repeatedly stated that potential conflict is not enough to require preemption – the conflict must be real.<sup>46</sup> Defendants' asserted conflict is that a compensatory award on Rose Cipollone's post-1965 claims would compel cigarette manufacturers to include specific additional warning labels on packages of cigarettes sold in New Jersey and to include specific warning language in advertising appearing in New Jersey. They contend that jury verdicts in other states would establish other warning requirements, and that the result would be multiple, nonuniform warnings, which would conflict with the purposes of the Act.

The defendants cannot, however, explain how this feared conflict derives from a jury award of compensatory damages. Jury verdicts for personal injuries in product liability actions do not create the "requirements" that concerned Congress. Such verdicts do not compel particular behavior, do not advise a manufacturer what activities it must curtail or implement, and do not inform a defendant as to the acceptable method of communicating information. For example, if a jury returned a favorable verdict on Mrs. Cipollone's post-1965 claims, even assuming it was based on special interrogatories, at most it would say: "Defendants failed to adequately warn Mrs.

<sup>46</sup> The Court held in *English*, 110 S. Ct. at 2278, that "for a state law to fall within the pre-empted zone, it must have some direct and substantial effect on the decisions made by those" who must adhere to the corresponding federal law. See also *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) ("The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute."); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 446 (1960) ("[T]his Court's decisions . . . enjoin seeking out conflicts between state and federal regulation where none clearly exists.").

Cipollone of the health hazards of cigarette smoking." The jury verdict would not tell the defendants of what specific hazards they should have warned, the precise language they should have used, the method they should have employed for conveying the information, or whether, but for their advertising and promotional practices, the federally-mandated warning would have sufficed.

Even if defendants were permitted to speculate how they might modify their behavior to avoid future adverse jury verdicts, they must concede the existence of a multitude of choices, none of which are constrained by the Act. For while it is clear that Congress intended to preclude states and federal agencies from promulgating rules requiring different warnings on cigarette packages, nothing in the Act precludes cigarette manufacturers from complying with the Act and at the same time providing additional information to consumers by means other than modifying the warning label.

Both before and after the effective date of the Act, cigarette manufacturers considered themselves free to provide the public with additional "health" information regarding their product. Unfortunately, they have done so only to cast doubt on the verity of the federally-mandated warning. Certainly, it could not have been Congress' intent to prohibit the industry from providing additional truthful information but to permit it to disseminate false and misleading information.

Finally, if cigarette manufacturers were queried how they would respond to a damage award on post-1965 common law tort claims they would, if truthful, confess they would pay the verdict, continue with business as usual, and build the damages into the cost of the product. Significantly, the defendants do not disagree. In fact, the industry has repeatedly dismissed these suits as a mere

financial flyspeck.<sup>47</sup> By speculating that adverse jury verdicts on state law tort claims may cause them to exercise one or more of their optional responses, the defendants are positing, at best, a hypothetical conflict, which is simply not enough.

### 3. Congress Has Accepted Any Tension That Might Arise From State Common Law Tort Actions

Although this Court has recognized that damage awards in common law tort actions may create a "tension" with the purpose of a federal act, such tension is insufficient to give rise to "actual conflict" preemption unless otherwise articulated by Congress. Explicit references to tort actions during the course of Congressional debate left no doubt that Congress recognized the existence of common law tort claims and willingly accepted any tension created between them and the federal act. See *supra* Point II B.

In *Silkwood*, the Court held that given the strong state interest and the presumption against preemption, whatever tension was created between the federal law and the state punitive damage action was tolerable:

No doubt there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages based on its own law of liability. But as we understand what was done over the years in the legislation

<sup>47</sup> See, e.g., Liggett Group, Inc. Annual Report to Shareholders, 1988, at 28; Securities and Exchange Commission, Quarterly Report Under Section 13 or 15(d) of the Securities Exchange Act of 1934, Philip Morris Companies Inc. and Subsidiaries, Notes to Consolidated Financial Statements, at 10 (Sept. 30, 1988); *Setback to Tobacco Industry Is Termed Slim by Analysts*, The New York Times, June 14, 1988, at B4.



concerning nuclear energy, Congress intended to stand by both concepts and to tolerate whatever tension there was between them. We can do no less.

464 U.S. at 256. See also *English*, 110 S. Ct. at 2280-1 (nuclear plant liable for intentional infliction of emotional distress of worker fired for whistle-blowing although federal regulations provide specific remedies for whistle-blowers under the Energy Reorganization Act); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 108 S. Ct. 1704, 1712 (1988) ("Congress may reasonably determine that incidental regulatory pressure [from damage awards] is acceptable, whereas direct regulatory authority is not.").

The narrow doctrine of "actual conflict" preemption only applies where compliance with state law is impossible or where the operation of state law frustrates the federal purpose. In this case, Congress has made clear that if a "tension" exists between the Act and common law tort claims, it is eminently acceptable and poses no obstacle to Congress' objectives.

#### POINT IV

#### CONGRESS DID NOT PREEMPT ROSE CIPOLLONE'S INTENTIONAL TORT CLAIMS

Mrs. Cipollone's intentional tort claims are not preempted by the Labeling Act, even under defendants' theory of preemption. An obvious, logical, and doctrinal distinction exists between failure to warn, which derives from a breach of an existing duty, and intentional deception of consumers, which arises from defendants' affirmative conduct designed to neutralize the effect of the federally-mandated warning by misrepresenting and mischaracterizing facts to the public. Such intentional conduct frustrates the educational objective of the Act. Furthermore, defendants' actual conflict argument, predicting multiple and confusing warnings, simply does not apply where the tort is premised on cigarette manufacturers' independent choice to address the public.<sup>48</sup>

An adverse verdict on Mrs. Cipollone's intentional tort claims could not result in the imposition of the defendants' hypothesized affirmative duty to say more. Such a verdict would, at most, mean that when the defendants choose to act and fail to do so honestly, they must pay for any resulting damage. Simply put, the issue turns on the distinction between nonfeasance and misfeasance.

The cigarette manufacturers have, of their own volition, addressed the public on the subject of smoking and health. Sadly, most of what they have chosen to say is not true. Knowing that millions of their consumers craved

<sup>48</sup> As the Supreme Court of Minnesota recently explained in *Forster v. R. J. Reynolds*, 437 N.W.2d 655, 662 (1989) (Pet. App. 177a), an action for common law misrepresentation "is based on a duty to tell the truth, not on a duty to warn." Although the Minnesota court found that the Labeling Act preempted failure to warn claims, it held that the manufacturer could still be held liable if it "chooses to provide further information." *Id.*



information that would help them rationalize their continued smoking, the tobacco industry designed sophisticated public relations and advertising campaigns to neutralize the federally-mandated warning and thereby assuage smokers' fears. These efforts were carried out by the cigarette companies individually through their product advertising,<sup>49</sup> and in concert through their trade associations, the Tobacco Institute and the Council for Tobacco Research.

An illustrative example of the joint industry effort is seen in 1967. Then, fearful of the impact of government efforts to educate the public about the health hazards of smoking, the tobacco industry hired a number of public relations firms to examine how they might best minimize the impact of such government action on sales. One such consultant was Ted Bates & Co., whose research findings, memorialized in a confidential report in 1967, revealed that "smokers are compelled to believe the government has not proved its case [and] want positive evidence on the other side to neutralize the government's position."

J.A. 39. The report concluded:

1. The objective "restore controversy" should be changed to "neutralize effect of government action."

<sup>49</sup> The FTC has concluded in its annual reports beginning with its first report to Congress in 1967 that the tobacco industry's advertising has effectively negated the effectiveness of the federally-mandated warning.

Cigarette commercials continue to appeal to youth and continue to blot out any consciousness of the health hazards. . . . To allow the American people, and especially teenagers, the opportunity to make an informed and deliberate choice of whether or not to start smoking, they must be freed from constant exposure to such one-sided blandishments and told the whole story.

1967 FTC Report at 29.

3. If any consumer advertising is done, a direct approach appears called for – the more directly it challenges the Surgeon General's position, the better.

J.A. 37. These recommendations served as a basic blueprint for much of the industry's public relations thereafter. Each time a Surgeon General's Report was issued, the industry responded by attacking it directly. At every opportunity, the industry took out "advertorials" in newspapers across the country such as "The question about smoking and health is still a question," which appeared in 1970. J.A. 42. It buttressed these public statements by referring to the millions of dollars the industry was spending on "independent" research conducted through its Council for Tobacco Research. J.A. 43. In reality, CTR's research was neither independent nor designed to resolve the smoking and health "question." As the scientific director of one of the defendants stated in a 1974 confidential corporate memo to his company's chief executive officer:

Historically, the joint industry funded smoking and health research programs have not been selected against specific scientific goals, but rather for various purposes such as public relations, political relations, position for litigation, etc. Thus, it seems obvious that reviews of such programs for scientific relevance and merit in the smoking and health field are not likely to produce high ratings.

J.A. 60.

The industry went so far as to have employees of its public relations firms write medical articles, under fictitious names, that appeared in the popular press directly challenging the Surgeon General's pronouncements. Examples of this include the "Cigaret Smoking and Cancer Link is Bunk" article, Pet. App. 227a, and the "To Smoke or Not to Smoke – That is Still the Question" article. Senate Cong. Rec., March 27, 1968, S. 3415-19.

As reported in a confidential memo to the President of the Tobacco Institute in 1972, the industry strategy, designed "to defend itself on three major fronts - litigation, politics and public opinion," had been very successful. J.A. 51-52. The memo noted, however, the need to develop a new story line if this success were to continue. The new message would argue the "Multi-factorial" and "Constitutional" hypotheses to explain the increased incidence of cancer in smokers. This message was not based on scientific research but rather on public relations research designed to determine how the industry could most effectively assuage its consumers' fears. The document noted:

Our 1970 public opinion survey showed that a majority (52%) believed that cigarettes are *only one of the many causes* of smokers having more illnesses. It also showed that half of the people who believed that smokers have more illness than non-smokers accepted the constitutional hypothesis as the explanation. Thus, there are millions of people who would be receptive to a new message, stating:

Cigarette smoking may not be the health hazard that the anti-smoking people say it is *because other alternatives are at least as probable.*

J.A. 53 (emphasis in original). This modification in strategy served as the latest weapon in the tobacco industry's arsenal for a new era of neutralization of government action. However, the tried and true "Can We Have An Open Debate about Smoking" strategy continued. J.A. 72.

The individual company efforts to mislead consumers were as effective, though somewhat less obvious. For example, Lorillard's internal marketing research reveals that the company was well aware that True cigarette "prone" smokers viewed the brand "as a healthy cigarette." With that understanding, they devised their advertising campaigns "[t]o touch the emotional and/or intellectual pressure points associated with the decision to move to True. For example, - the decision to quit smoking." J.A. 65. This strategy is seen in ads featuring copy such as "True, Easy on your mind. Easy on your

taste," and "Considering all I heard, I decided to either quit or smoke True. I smoke True."

These few examples of defendants' intentional wrongdoing provide only a flavor of the cigarette industry's extraordinary efforts to deceive their customers concerning the nature and extent of the health hazards of smoking. Permitting Mrs. Cipollone's claims based on these deceptions will not result in any affirmative duty to act. It may, however, encourage the defendants to be truthful in their voluntary overtures to the public - a result that would advance the educational goal of the Labeling Act.

Finally, the arguments presented in favor of allowing Rose Cipollone's common law failure to warn claims apply with even greater force to her intentional tort claims. This Court recognizes a heightened presumption against preemption of state law intentional tort actions and has consistently been loathe to immunize intentional wrongdoers under the guise of federal preemption.<sup>50</sup> The Court's refusal to protect deliberate tortious conduct in federally-regulated fields is especially evident in its recent consideration of cases involving nuclear power. In *English*, for example, the Court recognize[d] that the claim for intentional infliction of emotional distress at issue here may have some

<sup>50</sup> Thus, for example, common law actions for malicious libel are not preempted even in the heavily regulated field of labor relations. *Linn v. United Plant Guard Workers*, 383 U.S. 53, 63-64 (1966). For similar reasons, in the context of union activities governed by the NLRA, preemption does not operate to bar state law claims for intentional infliction of emotional distress through threats of violence, *Farmer v. United Brotherhood of C.&J. of America, Local 25*, 430 U.S. 290, 299-300 (1977), or claims involving misrepresentation, *Belknap v. Hale*, 463 U.S. 491, 511 (1983) (State has "substantial interest in protecting its citizens from misrepresentations that have caused them grievous harm", and that interest "clearly outweighs any possible interference with the [NLRB]'s function that may result from permitting the action for misrepresentation to proceed").

effect on these decisions, because liability for claims like petitioner's will attach additional consequences to retaliatory conduct by employers. As employers find retaliation more costly, they will be forced to deal with complaints by whistleblowers by other means, including altering radiological safety policies. Nevertheless, we believe that this effect is neither direct nor substantial enough to place petitioner's claim in the pre-empted field.

110 S. Ct. at 2278 (emphasis added).

The argument in favor of permitting common law tort claims against tortfeasors is all the more compelling here, where Congress did not intend to regulate every aspect of smoking and health. It is illogical to read the Act's preemption provisions to preclude actions founded upon the intentional subversion of the Act's objective. As Minnesota's highest court observed in *Forster*, Pet. App. 178a, "[t]o find in this situation an implied preemption, we would have to assume that Congress intended the Act to be a license to lie, an assumption both uncharitable to Congress and violative of this state's deep concern for honesty as well as health."

## CONCLUSION

Wherefore, petitioner respectfully requests that the decision of the United States Court of Appeals for the Third Circuit be reversed and the case remanded for further proceedings.

Respectfully submitted,

*On the Brief*  
 MARC Z. EDELL  
 CYNTHIA A. WALTERS  
 HARRIET DINEGAR MILKS  
 MARY ELLEN MYERS

MARC Z. EDELL  
*Counsel of Record*  
 BUDD LARNER  
 GROSS ROSENBAUM  
 GREENBERG & SADE, P.C.  
*Attorneys for Petitioner*  
 150 John F. Kennedy Parkway  
 CN 1000  
 Short Hills, New Jersey 07078  
 (201) 379-4800



## APPENDIX

INFORMATIONAL AID TO THE COURT  
FOR USE IN REVIEW OF THE JOINT APPENDIX\*

**Thomas F. Ahrensfield** – Philip Morris (1971- ).  
Vice President, General Counsel, Board of Directors Member. CTR Board of Directors Member.

**John R. Ave** – Loew's (1973- ).  
Vice President of Marketing, President and Chief Executive Officer. Tobacco Institute Communications Committee Chairman.

**James C. Bowling** – Philip Morris (1951- ).  
Director of Public Relations, Vice President, Director of Corporate Affairs. Tobacco Institute Communications Committee Member.

**Council for Tobacco Research – U.S.A. (CTR)**  
Established in 1954 as the Tobacco Industry Research Committee for the professed purpose of funding research relating to tobacco and health. Renamed Council for Tobacco Research – U.S.A. in 1964. Its members included American Tobacco, Brown & Williamson, Liggett (1964-1968), Lorillard, Philip Morris, R.J. Reynolds, United States Tobacco, and others. The chief executives of the member companies served on CTR's Executive Committee and later its Board of Directors, which set the organization's policy and budget. The organization employed a Scientific Advisory Board to review grant applications, recommend research projects, and oversee research conducted under CTR's auspices.

**High Cullman** – Philip Morris (1948-1988).  
Vice President and Vice Chairman.

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\*Information contained herein was principally derived from discovery conducted in this case in the mid- to late 1980's.

**Joseph F. Cullman, III** - Philip Morris (1954- ). Executive Vice President, President, Chairman of the Board, Chief Executive Officer, Chairman Emeritus of Board of Directors. CTR Board of Directors Member. Tobacco Institute Executive Committee Member.

**William U. Gardner, Ph.D.** - CTR (1971-1981). Scientific Advisory Board, Scientific Director.

**Bowman Gray, Jr.** - R.J. Reynolds (1957-1967). President, Chairman of Executive Committee. Tobacco Institute Board of Directors Member.

#### **Hill & Knowlton**

Retained by founding members of TIRC to give advice to the industry as to how it should respond to articles in the public press linking smoking and lung cancer. Hill & Knowlton recommended the formation of the TIRC and became public relations counsel to it and later to the TI upon its formation in 1958. Relationship with the cigarette industry terminated in the late 1960's.

**Robert C. Hockett** - CTR (1955- ). Associate Scientific Director, Vice President, Research Director.

**Alexander Holtzman** - Philip Morris (1968- ). General Counsel.

**Edward A. Horrigan, Jr.** - R.J. Reynolds (1978- ). Executive Vice President, President, Chairman of the Board and Chief Executive Officer, Tobacco Institute Executive Committee Member.

**Curtis H. Judge** - Loew's (1968- ). President, Chairman of the Board and Chief Executive Officer. CTR Board of Directors Member. Tobacco Institute Board of Directors Member.

**William Kloepfer, Jr.** - Tobacco Institute (1969- ). Public Relations Counsel, Senior Vice President.

**Horace R. Kornegay** - Tobacco Institute (1969- ). Vice President, President, Chairman.

**David C. Loomis** - Ted Bates & Co. Account executive. Handled Tobacco Institute account in conjunction with Tiderock.

**James J. Morgan** - Philip Morris (1968-1982). Vice President Brand Management, Executive Vice President Marketing.

**Frederick Panzer** - Tobacco Institute (1967- ). Vice President Public Relations Vice President.

**Rosser Reeves** - Ted Bates & Co., Tiderock. Chairman of the Board of Ted Bates. Left to form own public relations firm (Tiderock). Handled TI accounts.

**Alexander W. Spears** - Loew's (1965- ). Research Chemist, Vice President Research & Development, Executive Vice President of Operations & Research. CTR Board of Directors Member.

**Arthur J. Stevens** - Loew's (1967- ). General Counsel.

**Ted Bates & Co.** - Public Relations and advertising agency employed by various tobacco companies and the TI.

**Tiderock Corp.** Public relations firm formed by Rosser Reeves in 1960's. Handled Tobacco Institute account.



**Tobacco Institute (TI)**

Trade association founded in 1958 to conduct lobbying and public relations efforts on behalf of its membership, which included Liggett, Philip Morris, Lorillard (except for the years 1968-1970), R.J. Reynolds and American Tobacco. The presidents and chief executive officers of the member companies served on the Executive Committee of the TI and dictated its policy. On a rotating basis, each of the members of the Executive Committee became its chairman and was designated to speak for the membership.

**Tobacco Industry Research Committee.**

See Council for Tobacco Research.

**Reginald B. Wells - Tiderock Corp.**

Executive Vice President, Public Relations.

**Addison Yeaman - Brown & Williamson, and CTR (1937-1980).**

General Counsel of Brown and Williamson, President of CTR.

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### QUESTION PRESENTED

Whether the Cigarette Labeling and Advertising Act, which expressly forbids any legal requirement of a warning on cigarette packages other than that prescribed by Congress, and which also expressly forbids the imposition of any health-related "requirement or prohibition . . . under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter," 15 U.S.C. § 1334, permits courts to impose liability under state law in personal injury lawsuits for alleged inadequacies in the warning label or alleged improprieties in the advertising or promotion of properly labeled cigarettes.



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1991

No. 90-1038

THOMAS CIPOLLONE,  
v. *Petitioner,*

LIGGETT GROUP INC., A Delaware Corporation;  
PHILIP MORRIS INCORPORATED, A Virginia Corporation;  
and LOEW'S THEATRES, INC., A New York Corporation,  
*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Third Circuit

**BRIEF FOR RESPONDENTS**

**STATEMENT**

This case involves the Federal Cigarette Labeling and Advertising Act (the "Act" or the "Labeling and Advertising Act"), 15 U.S.C. § 1331 *et seq.*<sup>1</sup> The Act establishes a "comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

<sup>1</sup> Congress originally enacted the Federal Cigarette Labeling and Advertising Act in 1965. Pub. L. No. 89-92, 79 Stat. 282. The Act was amended by the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970). (Although that Act was enacted in 1970, its title refers to 1969, and its amendment to 15 U.S.C. § 1334(b) took effect on July 1, 1969. We therefore refer to that law as the 1969 Act.) The Act was further amended in 1984 by the Comprehensive Smoking Education Act, Pub. L. No. 98-474, 98 Stat. 2200.

This brief generally cites to the 1969 version of the Act—the version addressed by both the court of appeals (Pet. App. 95a-108a) and the district court (*id.* at 109a-62a)—unless otherwise expressly indicated. Differences among the 1965, 1969, and 1984 Acts are pointed out where appropriate.



(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

§ 1331. In addition to setting forth the federal program to achieve the required balance of interests—including the precise warning to be placed on each package of cigarettes (“Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health”), § 1333<sup>2</sup>—the Act broadly preempts state action (§ 1334):

(a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.<sup>3</sup>

The court of appeals in this case held that the Labeling and Advertising Act preempted the state-law tort claims at issue in this Court.

1. *The Lawsuit.* Plaintiffs Rose D. Cipollone and her husband, Antonio Cipollone, brought this diversity action

<sup>2</sup> The label originally drafted by Congress in 1965 stated: “Caution: Cigarette Smoking May Be Hazardous to Your Health.” Pub. L. No. 89-92, § 4, 79 Stat. 283. In 1984, Congress required rotation of four prescribed warnings. Pub. L. No. 98-474, § 4, 98 Stat. 2202.

<sup>3</sup> In the 1965 Act, Section 1334(b) stated: “No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.” Pub. L. No. 89-92, § 5(b), 79 Stat. 283.

against respondents Liggett Group Inc., Philip Morris Incorporated, and Loew's Theatres, Inc.<sup>4</sup> Invoking various theories of New Jersey product liability law, the plaintiffs alleged that Mrs. Cipollone developed lung cancer because, for some 40 years, she smoked cigarettes manufactured by respondents. As developed in the third amended complaint, and as relevant here, the asserted liability of respondents was premised on their alleged failure to provide adequate warnings regarding smoking and health, breach of express warranties regarding smoking and health, fraudulent misrepresentations regarding smoking and health in advertising and promotion, and conspiracy to defraud the public regarding smoking and health. Pet. App. 17a; J.A. 81-94.<sup>5</sup>

Respondents raised the defense, among others, that those claims were preempted by the Labeling and Advertising Act to the extent that they asserted liability for any post-1965 conduct.<sup>6</sup> The district court rejected the preemption argument and struck the defense. Pet. App. 109a-62a. The court concluded that the Act's preemption provision, § 1334, applied only to statutes and adminis-

<sup>4</sup> Petitioner in this Court is Thomas Cipollone, as executor for the estates of both Rose Cipollone and Antonio Cipollone. The Rule 29.1 statement for respondents is set forth at footnote 2 of the Memorandum filed in response to the petition for certiorari.

<sup>5</sup> The express warranty claim was based on a New Jersey statute, N.J. Stat. Ann. § 12A:2-313(1), the State's version of the Uniform Commercial Code. See Pet. App. 44a-61a. See also U.C.C. §§ 2-714, 2-715 (remedy sections for breach of warranty).

Plaintiffs also asserted that respondents failed to use a safer alternative design for their cigarettes (what the court of appeals deemed the “design-defect claim”) and that the risks of respondents' cigarettes simply outweighed their social utility irrespective of whether they could have been made safer and even though they were sold with the federal warning (the “generic risk-utility claim”). See Pet. App. 17a. Neither claim is before this Court. See note 9, *infra*.

<sup>6</sup> The Act took effect on January 1, 1966. 79 Stat. 284. It is undisputed that respondents' cigarettes have at all times since then been labeled in conformity with the Act.

trative regulations, not to requirements or prohibitions imposed by the state law of torts and enforced by courts and juries in actions for damages. Pet. App. 123a-30a. The court also concluded that Congress did not preempt state common law claims by "occupying the field" and that state common law standards were not in "irreconcilable conflict" with the Act. *Id.* at 146a-61a.

2. *The First Appeal.* On interlocutory appeal pursuant to 28 U.S.C. § 1292(b), a unanimous panel of the court of appeals reversed. Pet. App. 95a-108a. The court of appeals explained that the preemption provision, together with the remainder of the Act, effected a broad preemption of obligations respecting warnings, advertising, and promotion (*id.* at 105a):

Congress has provided us with an explicit statement of the Act's purposes in section 1331. That statement reveals that the Act represents a carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of national economy. . . . Moreover, the preemption provision of section 1334, read together with section 1331, makes clear Congress's determination that this balance would be upset by either a requirement of a warning other than that prescribed in section 1333 or a requirement or prohibition based on smoking and health "with respect to the advertising or promotion" of cigarettes. See 15 U.S.C. § 1334.

The court then concluded that duties such as those asserted by plaintiffs in their damages action were within the scope of the statutory preemption (*id.* at 105a-06a):

[W]e accept the [respondents'] assertion that the duties imposed through state common law damage actions have the effect of requirements that are capable of creating "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." . . . [W]e conclude that claims relating to smoking and health that result in liability for noncompliance with warning, advertisement, and promotion obligations other than those prescribed in the

Act have the effect of tipping the Act's balance of purposes and therefore actually conflict with the Act.

The court accordingly held (*id.* at 106a (footnote omitted))

that the Act preempts those state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes. We further hold that where the success of a state law damage claim necessarily depends on the assertion that a party bore the duty to provide a warning to consumers in addition to the warning Congress has required on cigarette packages, such claims are preempted as conflicting with the Act.

The court of appeals reversed the district court's order striking the preemption defense and remanded for application of its opinion to the various claims. Pet. App. 108a. This Court denied a petition for a writ of certiorari. *Cipollone v. Liggett Group, Inc.*, 479 U.S. 1043 (1987).<sup>7</sup>

3. *Proceedings on Remand.* On remand, the district court found that, under the court of appeals' ruling, post-1965 claims of failure to warn, conspiracy, intentional misrepresentation, and express warranty were preempted. *Cipollone v. Liggett Group, Inc.*, 649 F. Supp. 664 (D.N.J. 1986). Petitioner conceded, and the court agreed, that the failure-to-warn claims, grounded either in strict liability or in negligence, were preempted under the court of appeals' ruling. *Id.* at 669, 673. Turning to the claims of intentional misrepresentation and conspiracy, the court found no tenable distinction between claims based on what was said and claims based on what was not said: "[h]av-

<sup>7</sup> All four of the other federal courts of appeals that have addressed the preemption question subsequently agreed with the Third Circuit's ruling. *Pennington v. Vistrion Corp.*, 876 F.2d 414 (5th Cir. 1989); *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230 (6th Cir. 1988); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987); *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987).



ing concluded that the Court of Appeals meant to exempt defendants from liability for what they did say, it follows that they cannot be held liable for what they did not say." *Id.* at 673.<sup>8</sup> Finally, on the express warranty claim, the court stated: "this claim inevitably brings into question defendants' advertising and promotional activities, and is therefore preempted." *Id.* at 675.<sup>9</sup>

The case ultimately proceeded to trial on various non-preempted claims. After a five month trial, the jury returned a verdict rejecting plaintiffs' major claims alleging pre-1966 fraudulent misrepresentation and conspiracy.<sup>10</sup> On the pre-1966 claim that Liggett had failed adequately to warn Mrs. Cipollone of the health effects of smoking, the jury found that Liggett had failed adequately to warn but that 80% of the responsibility for Mrs. Cipollone's injuries was her own. Under New Jersey comparative fault rules, that apportionment of responsibility precluded liability. Finally, on the pre-1966 express warranty claim

<sup>8</sup> In finding these claims preempted, the court observed that "allegations that defendants 'ignored and failed to act upon' medical and scientific data . . . amount to nothing more than a failure to warn." 649 F. Supp. at 674. Likewise, the court found that a claim attempting "to make defendants liable for intentionally 'neutralizing' the effects of the federally-mandated warning labels by means of their advertising, by its own terms, . . . challenges conduct which would fall within the category of 'advertising' and is therefore preempted." *Ibid.*

<sup>9</sup> The district court held that plaintiffs' two other theories were not preempted—the "design defect" and "generic risk utility" claims. *See* note 5, *supra*. Trial proceeded on the design-defect claim, but the court directed a verdict for respondents on that claim at the close of the plaintiffs' case—ruling that plaintiffs had failed to prove their case—and that ruling was not appealed. *See* Pet. App. 19a-20a. No trial was held on the risk-utility claim because the district court concluded that the claim was barred by a New Jersey statute. *See id.* at 19a. That part of the judgment was subsequently set aside by the Third Circuit. *Id.* at 78a-80a. That ruling is not before this Court.

<sup>10</sup> These were the only claims left against respondents Philip Morris and Loew's Theatres, who did not manufacture the cigarettes smoked by Mrs. Cipollone before 1966. Pet. App. 19a.

against Liggett, the jury found, as to liability, that Liggett had breached express warranties regarding smoking and health and, as to damages, that Mrs. Cipollone had sustained no damages, while her husband had sustained damages of \$400,000. *See* Pet. App. 20a-24a.<sup>11</sup>

4. *The Second Appeal.* On cross-appeals, the court of appeals reversed the judgment in favor of Antonio Cipollone on the express warranty claim because the district court's instructions erroneously precluded the jury from considering that Mrs. Cipollone understood the risks of smoking and disbelieved the claimed warranties. Pet. App. 44a-62a, 60a. Because of other instruction errors, the court also reversed and remanded for a new trial on the failure-to-warn judgment for Liggett. *Id.* at 28a-36a, 91a. The court of appeals, however, affirmed that part of the judgment holding that the Labeling and Advertising Act preempted the claims based on post-1965 failure to warn, advertising, and promotion—the failure to warn, express warranty, misrepresentation, and conspiracy claims. *Id.* at 88a-91a. Rejecting attempts by petitioner to draw a line between the failure-to-warn claims and intentional tort claims, the court observed that the latter claims "manifestly 'challenge[] . . . the propriety' of the defendants' 'actions with respect to the advertising and promotion of cigarettes.'" *Id.* at 90a. The

<sup>11</sup> Petitioner makes a variety of irrelevant, incomplete, and erroneous assertions about the evidence in this case, particularly as it relates to Mrs. Cipollone's awareness and understanding of the risks of smoking. We note only that (1) all of the evidence "demonstrat[ing] all of the facts which caused or influenced her to continue smoking once she was warned" was in fact admitted, not excluded, at trial (Tr. 4118-19); (2) after a five month trial the bulk of which focused on petitioner's allegations of pre-1966 conspiracy and fraud, the jury specifically rejected those allegations; and (3) in attributing 80% of the fault to Mrs. Cipollone on the failure-to-warn claim, the jury necessarily found, in the language of the jury instructions, that she "had an understanding and appreciation of the nature and extent of the health risks of cigarette smoking" and "voluntarily and unreasonabl[y] proceeded to encounter those risks" (Tr. 12,743). *See generally* J.A. 120-61.



court thus held that, under its prior decision, the Act preempted all four claims that are at issue in this Court.

### SUMMARY OF ARGUMENT

Petitioner's claims are barred under any theory of preemption—express or implied, field or conflict. The Labeling and Advertising Act declares a federal policy demanding uniform federal standards in a prescribed area, creates a regulatory scheme that the Act itself deems comprehensive, and includes an express preemption provision as an integral part of that scheme. The state tort duties that petitioner seeks to impose on respondents come within the express preemption provision, conflict with the declared federal policy, and intrude on the field occupied by the Act.

I. As the language and background of the Act show, Congress has established a “comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health.” § 1331. Implementing that program, Congress has, among other things, required a specific warning on packages (§ 1333), decided initially that no warning should be required in advertising and later authorized the FTC to require such a warning (§ 1336(a)), ensured FTC regulation of deceptive advertising (§ 1336(b)), and called for regular reporting to Congress itself on the health consequences of smoking and advertising practices with regard to cigarettes (§ 1337). This scheme was the carefully crafted means “whereby” Congress chose to pursue its aim of “adequately inform[ing]” the public regarding health hazards of smoking through simple, consistent messages, while also protecting the national economy both generally and against the burdens of “diverse, non-uniform, and confusing labeling and advertising regulations.” § 1331. And, to preserve the federal scheme, Congress included a broad preemption provision: it expressly preempted any requirement of other statements relating to smoking and health on packages (§ 1334(a)) as well as any state-law requirement or prohibition based

on smoking and health with respect to advertising or promotion of properly labeled cigarettes (§ 1334(b)). The Act thus makes clear that Congress did not intend for States to impose additional obligations with respect to warnings, or with respect to advertising and promotion, based on their own views about the relationship between smoking and health.

II. A. Obligations imposed by the state common law of torts—like obligations imposed under other types of state law—fall within the preempted area. The Act by its terms preempts any attempt to “require” additional warnings or to impose “requirement[s] or prohibition[s]” on advertising and promotion “under State law.” The phrase “under State law” clearly includes state tort law (see, e.g., *Norfolk & Western Ry. v. American Train Dispatchers Ass’n*, 111 S. Ct. 1156, 1163 (1991); *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972)); and a tort duty is by ordinary usage a “requirement” or “prohibition” (see, e.g., *Restatement (Second) of Torts* §§ 4 (“duty”), 402A comment *h* (failure to warn of product dangers)). This Court, in fact, has often made the common-sense point that, like other forms of legal duties, common-law tort duties do, and are designed to, “govern[] conduct and control[] policy.” *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959); see *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990); *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). Although petitioner and his *amici* try mightily to escape this self-evident conclusion, they cannot do so: the fact remains that tort duties impose requirements or prohibitions, regardless of the source of the state duty (common law or statute), the remedy employed to enforce the duty (damages or injunctions), the party initiating enforcement (private parties or the State), or the specificity of the duty (written directly to target cigarettes or not). None of those wishful distinctions is a reason to disregard the obvious meaning of Section 1334, which flatly preempts *any* state-imposed obligations in the area.

B. The imposition of state tort obligations would also interfere with the declared purposes of the Act. To per-

mit individual States, and indeed individual juries, to decide for themselves whether the warning required by Congress was adequate, or to set varying standards for the advertising and promotion of properly labeled cigarettes, would inevitably produce "diverse, nonuniform, and confusing" regulation and chaotic marketing conditions. § 1331. Congress meant to avoid just such upheaval by enacting a "comprehensive Federal program" (§ 1331) and by retaining for itself the right to balance the goals of "adequately inform[ing]" the public about smoking and health and of protecting "commerce and the national economy." Petitioner points to nothing in the Act that establishes what otherwise seems wholly implausible: that Congress was willing to let States strike an entirely different balance as long as they did so by means of the common law of torts, rather than by other varieties of state law. In fact, the broad wording of the Act, and the absence of a savings clause, show just the opposite.

C. The Act preempts all of the claims before this Court. The basic claims, premised on failure to warn, improperly attack the adequacy of the federal warning: by definition, they seek to establish a state-law duty to provide *additional* warnings regarding smoking and health. The remaining claims (express warranty, misrepresentation, and conspiracy) impermissibly seek to impose state-law requirements and prohibitions on the advertising or promotion of cigarettes. All of the claims, moreover, would necessarily lead to overlapping regulation on a state-by-state basis, contrary to the comprehensive *federal* program established by Congress.

## ARGUMENT

### I. THE LABELING AND ADVERTISING ACT PRE-EMPTS THE IMPOSITION UNDER STATE LAW OF ANY HEALTH-BASED OBLIGATIONS WITH RESPECT TO WARNINGS AND WITH RESPECT TO THE ADVERTISING OR PROMOTION OF PROPERLY LABELED CIGARETTES.

In judging whether state law is preempted under the Supremacy Clause because it is incompatible with federal law, "[t]he purpose of Congress is the ultimate touchstone." *Ingersoll-Rand*, 111 S. Ct. at 482 (internal quotation marks omitted); see *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985). To discern the pertinent congressional intent, the Court must "examine the explicit statutory language and the structure and purpose of the statute." *Ingersoll-Rand*, 111 S. Ct. at 482. In the present case, all of those sources lead directly to the conclusion that, under the Labeling and Advertising Act, the labeling, advertising, and promotion of cigarettes may not be subjected to state-law obligations based on the relationship between smoking and health.

#### A. This Case Involves Express and Implied, Field and Conflict, Preemption.

The Court has observed that "[p]re-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983) (internal quotation marks omitted); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53 (1982); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Within the category of implied preemption, moreover, the Court has recognized at least two types of preemption—field preemption, where a statute occupies a field exclusively for federal control, so that no state action is permissible in that field; and conflict preemption, where a statute establishes a federal program or policy that preempts those particular state measures or actions whose effects "interfere[] with" or "stan[d] as an obstacle to



the accomplishment of the full purposes and objectives of Congress." *Felder v. Casey*, 487 U.S. 131, 138 (1988) (internal quotation marks omitted); see *English v. General Elec. Co.*, 110 S. Ct. 2270, 2275 (1990); *Perez v. Campbell*, 402 U.S. 637, 649 (1971); *Free v. Bland*, 369 U.S. 663, 666 (1962).<sup>12</sup>

Although (as shown below) all of those categories are applicable in this case, it is hardly necessary to discuss them, nor appropriate to treat them (as petitioner does), as if they were wholly unrelated to one another. As the Court has pointed out, the preemption categories are not "rigidly distinct." *English*, 110 S. Ct. at 2275 n.5. An express preemption provision always defines a field within which States may not act. And field preemption "may be understood as a species of conflict pre-emption: a state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation" in order to prevent disuniformity. *Ibid.* Similarly, in determining the scope of an express preemption provision, the Court looks—as in an implied preemption analysis, and as in any case of statutory construction—to the structure, purposes, and background of the statute as a whole. See, e.g., *Wisconsin Pub. Intervenor v. Mortier*, 59 U.S.L.W. 4755, 4757-60 (U.S. June 21, 1991); *Shaw*, 463 U.S. at 95-100; L. Tribe, *American Constitutional Law* § 6-26, at 482 n.8 (1988) ("preemption is ultimately a matter of construing a federal

<sup>12</sup> If the effect of a state measure is to frustrate the federal policy—either the congressional goals or the operation of the congressionally chosen methods to achieve them—the state measure cannot be saved because of its purpose or its importance to the State. See *Felder v. Casey*, 487 U.S. at 138 ("'[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law'" (quoting *Free v. Bland*, 369 U.S. at 666)); *de la Cuesta*, 458 U.S. at 153; *Perez v. Campbell*, 402 U.S. at 651-52 (effect rather than purpose of state law governs preemption analysis); *International Paper*, 479 U.S. at 494, 498 n.19 (same); *Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 477 (1984).

statute").<sup>13</sup> In a case like this, therefore, it is hardly surprising that the language of the preemption provision, the avowedly "comprehensive" scheme established by the Act, and the particular policies set forth by Congress—each one of which reflects the congressional intent embodied in the others—all point to the same conclusion: preemption of state-imposed health-based obligations with respect to warnings or to advertising and promotion. This case, in short, is a case involving express and implied, field and conflict, preemption.<sup>14</sup>

This conclusion takes full account of the general presumption, invoked by petitioner (Pet. Br. 13, 18), against inferring congressional intent to displace traditional state regulation. See, e.g., *English*, 110 S. Ct. at 2275; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). What petitioner fails to appreciate is that, as is apparent on the face of the statute, Congress *did* deliberately oust the States of their traditional authority to use core police powers in the area covered by the Act. Far from a case requiring inferences from policies not addressed to the question of state involvement, this case thus concerns a statute that expressly preempts state activity and expressly declares a policy of nationwide uniformity. §§ 1331, 1334. Even without such express provisions (e.g., *International Paper*, *supra*), "this Court has not hesitated to draw an inference of field pre-emption where it is supported by the federal statutory and regulatory

<sup>13</sup> We note that, contrary to what petitioner contends, the presence of an express preemption provision does not prevent the Court from applying principles of implied preemption as well. See, e.g., *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 514-19 & n.12 (1989); *Jones v. Rath Packing Co.*, 430 U.S. at 532-43.

<sup>14</sup> See L. Tribe, *American Constitutional Law* § 6-25, at 481 n.14 (1988) (The "categories of preemption are anything but analytically air-tight. For example, even when Congress declares its preemptive intent in express language, deciding exactly what it meant to preempt often resembles an exercise in implied preemption analysis. So too, implied preemption analysis is inescapably tied to the presumption that Congress did not intend to allow state obstructions of federal policy, a central inquiry in conflict preemption analysis.").



schemes." *English*, 110 S. Ct. at 2275. With the Labeling and Advertising Act's provisions, the preemptive intent is "clear and manifest." *Ibid.* (quoting *Jones v. Rath Packing Co.*, 430 U.S. at 525).

**B. The Labeling and Advertising Act, as a Whole and Through Its Express Preemption Provision and Declared Policies, Broadly Preempts State-Law Health-Based Obligations with Respect to Warnings and with Respect to the Advertising and Promotion of Properly Labeled Cigarettes.**

The Labeling and Advertising Act marks out a carefully defined field for exclusive federal control: any health-based obligations imposed with respect to warnings or on advertising and promotional activities. We do not contend that the Act occupies "the entire field of smoking and health." Pet. Br. 15, 31-32. For example, the field does not include state-law obligations to avoid marketing cigarettes with manufacturing defects or to use a demonstrably safer alternative design for cigarettes, at least to the extent that the obligations do not involve the information communicated to consumers. Also outside the field are informational duties regarding smoking and health imposed on broadcasters and similar third parties unrelated to the cigarette industry. *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). Similarly, the Act does not cover laws that restrict the sale of cigarettes to minors or the use of cigarettes in public places. See Pet. Br. 31. But within the field that the Act does occupy, federal control is complete, as its background, language, structure, and policies make clear.

**1. Congress Insisted on Establishing the Governing Policy in This Field.**

The background of the Labeling and Advertising Act reveals unmistakably that Congress meant to set and monitor policy with respect to the obligations imposed on cigarette manufacturers. Prior to 1965, there was no statutory or administrative regulation specifically ad-

dressed to cigarette labeling or advertising; and although product liability actions had been brought against cigarette manufacturers, no liability for properly manufactured cigarettes had ever been imposed. In 1964, the Surgeon General's Report concluded that "[c]igarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action."<sup>15</sup> Almost immediately, a number of States proposed laws to regulate cigarette advertising and labeling,<sup>16</sup> and the FTC promulgated a regulation that would have required a warning to be placed both on cigarette packages and in advertisements. 29 Fed. Reg. 530 (1964); 29 Fed. Reg. 8324 (1964). Preempting these initiatives, Congress in 1965 itself decided to act definitively with respect to the subject of smoking and health by enacting the first cigarette labeling and advertising statute. Pub. L. No. 89-92, 79 Stat. 282. It returned to the field, adjusting its program, in 1969 and again in 1984. Pub. L. No. 91-222, 84 Stat. 87; Pub. L. No. 98-474, 98 Stat. 2200.

The actions taken by Congress, and reflected in the Act, rested on several fundamental considerations. To begin with, Congress concluded that while "the individual must be safeguarded in his freedom of choice—that he has the right to choose to smoke or not to smoke— . . . the individual has the right to know that smoking may be hazardous to his health." 1965 House Report 3-4; S. Rep. No. 195, 89th Cong., 1st Sess. 4 (1965) ["1965 Senate Report"]. Congress then determined that the proper approach was to have a single, federal legislative response: "The determination of appropriate remedial action in this area . . . is a responsibility which should be exercised

<sup>15</sup> See H.R. Rep. No. 449, 89th Cong., 1st Sess. 2 (1965) ["1965 House Report"] (quoting *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service* 33 (1964)).

<sup>16</sup> See, e.g., 111 Cong. Rec. 13901 (1965) (Sen. Moss); *Cigarette Labeling and Advertising: Hearings Before the Senate Comm. on Commerce*, Pt. 1, 89th Cong., 1st Sess. 39 (1965) (Sen. Magnuson) ["1965 Senate Hearings"].

by the Congress after considering all facets of the problem." 1965 House Report 3. This national solution was required because Congress saw the need to balance several interests: on the one hand, it had to consider the "broad implications in the field of public health and health research"; on the other, it had to take account of the "potentially far-reaching consequences for a number of sectors of our economy. The entire tobacco raising and manufacturing industry, and the numerous businesses which market tobacco products, are involved." *Ibid.* Still more particularly, Congress was concerned that a variety of different requirements in the area not only could unduly impede commerce but "could create chaotic marketing conditions and consumer confusion." *Id.* at 4; 1965 Senate Report 4-5.<sup>17</sup>

These purposes and the delicacy of the national balance among them are reflected in Congress's repeated insistence that it, with carefully defined and closely monitored assistance from federal agencies, would determine policy in the area of labeling and advertising. Thus, Congress from the beginning has tightly controlled the actions of even *federal* agencies in the field. Not only did it preempt proposed FTC action in 1965, but in 1969 Congress again prohibited a proposed FTC rule (34 Fed. Reg. 7917), and then insisted that future proposed FTC action be submitted for congressional review (§ 1336(a)).<sup>18</sup> Likewise, when the Federal Communications Commission announced in 1969 that it was considering a ban on broadcast adver-

<sup>17</sup> See *Cigarette Advertising and Labeling: Hearing Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. 177 (1969) (Sen. Moss) ["1969 Senate Hearings"] ("[A]ll agree on the fact that there certainly ought to be a preemption of State action. This is a national problem and it must be dealt with on a national basis."). See 111 Cong. Rec. 13930 (1965) (Sen. Morton) ("The problem of smoking and health is national in scope. It is clearly one in which Congress should occupy the field."); 1965 Senate Report 4; 1965 House Report 3-4.

<sup>18</sup> In 1972, an administrative consent decree required in advertising the same warning that Congress had required on packages. *In re Lorillard*, 80 F.T.C. 455 (1972).

tising of cigarettes (34 Fed. Reg. 1959), Congress preempted that proposal (adopting the ban itself) so as to prevent "intrusion by the [FCC and the FTC] into basic areas of policymaking which [Congress] has reserved to itself." H.R. Rep. No. 289, 91st Cong., 1st Sess. 5 (1969) (emphasis added). And throughout the history of the Act, Congress has required the submission of current information about both the health and commerce aspects of the issues,<sup>19</sup> and it has twice made various adjustments to the Act—notably, modifying the language of the warning in both 1969 and 1984, requiring that advertisements carry the warning in 1984, and adopting the present language of Section 1334(b) in 1969.<sup>20</sup> As we next discuss, nothing in the Act supports the view that, despite its dominant role in setting and implementing policy in this field, Congress meant to leave room for the States to impose their own requirements, according to their separate views of proper policy, as well.

## 2. The Preemption Provision of the Act Broadly and Unequivocally Preempts State Law.

Section 1334 of the Labeling and Advertising Act expressly ousts States of any ability to compete with the federal regime. As the Court has said of a similar provision, "[t]he pre-emption clause is conspicuous for its

<sup>19</sup> The Act requires annual reports from the FTC and the Secretary of Health and Human Services (originally, Health, Education, and Welfare) on the health consequences of smoking, on advertising practices, and on the effectiveness of labeling. § 1337. Congress has annually received the required reports and has held its own hearings. See S. Rep. No. 566, 91st Cong., 1st Sess. 3-10 (1969) ["1969 Senate Report"]; S. Rep. No. 177, 98th Cong., 1st Sess. 3-7 (1983); H.R. Rep. No. 805, 98th Cong., 2d Sess. 6-7 (1984).

<sup>20</sup> Although the 1984 Act is not involved in this case, it reaffirms Congress's decision to keep for itself (and to exercise) active control of the statutorily defined field. That Act specified a new regime requiring four rotating warnings and demanded that the language be placed not only on cigarette packages but also in cigarette advertising, thus taking the matter of affirmative advertising requirements from FTC control. Pub. L. No. 98-474, § 4(a)(2) and (3), 98 Stat. 2202.



breadth.' " *Ingersoll-Rand*, 111 S. Ct. at 482 (quoting *FMC Corp. v. Holliday*, 111 S. Ct. 403, 407 (1990)). Section 1334(a) declares that "no" statement "relating to" smoking and health may be required on any package. And Section 1334(b) declares that "[n]o requirement" and no "prohibition" that is "based on smoking and health" may be "imposed under State law with respect to the advertising or promotion" of properly labeled cigarettes.

These terms are obviously sweeping. They expressly extend to both "misfeasance" and "nonfeasance" (Pet. Br. 16)—what one says and what one fails to say—for they preempt both "prohibition[s]" and "requirement[s]." <sup>21</sup> They refer to any imposition "under State law," making no distinctions among the various branches of government (legislative, executive, or judicial), or government entities (including a jury), that might impose the requirement or prohibition.<sup>22</sup> Preemption extends to any imposition under state law that requires or prohibits certain conduct, whether under a statute targeted at cigarettes or under a general standard as applied to cigarettes judicially or administratively; it is not confined to "statute[s], injunction[s], or executive pronouncement[s]" (Pet. Br. 20) or to actions of "administrative agencies, counties, and municipalities" (Pet. Br. 23). And there is neither a savings clause nor any exception stated for any particular type of law, including the common law of torts.<sup>23</sup>

<sup>21</sup> Petitioner himself states: "'Prohibition' is nothing more than the flip side of 'requirement,' proscribing certain behavior as opposed to demanding it." Pet. Br. 24.

<sup>22</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) ("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."); *Ex parte Virginia*, 100 U.S. 339, 347 (1880) ("A State acts by its legislative, its executive or its judicial authorities."); *Edmonson v. Leesville Concrete Co.*, 59 U.S.L.W. 4574, 4577 (U.S. June 3, 1991) (jury is "quintessential governmental body").

<sup>23</sup> Congress plainly knows how to include an adequate savings clause. See, e.g., 15 U.S.C. § 4406(c) (Smokeless Tobacco Act); 29

This Court has said: "Where, as here, Congress has expressly included a broadly worded pre-emption provision in a comprehensive statute . . . , [the Court's] task of discerning congressional intent is considerably simplified." *Ingersoll-Rand*, 111 S. Ct. at 482 (discussing pre-emption provision of ERISA). Here, the preemption provision not only is broadly worded but plays a crucial role in a comprehensive scheme, as discussed below. The preemption provision, by "the normal reach of its words" (*Garcia v. United States*, 469 U.S. 70, 76 (1984)), whether read alone or with reference "to the design of the statute as a whole and to its object and policy" (*Crandon v. United States*, 110 S. Ct. 997, 1001 (1990)), covers *any* state-law health-based obligation with respect to warnings or with respect to the advertising or promotion of cigarettes, whether imposed for speaking or for failing to speak.

Although petitioner tries to narrow the plain language of Section 1334(b) (Pet. Br. 18-22), noting that it was differently worded prior to 1969 (see note 3, *supra* (quoting language)), that effort is fruitless. There is simply no reasonable way to read the existing language of the provision ("no requirement or prohibition . . . shall be imposed") as anything other than what it is: a broad preemption of all state-law health-based requirements or prohibitions with respect to advertising or promotion of cigarettes. What petitioner wants to do, in essence, is to rewrite the provision to say: "Except for some requirements and prohibitions, no requirement or prohibition shall be imposed . . . ." That endeavor runs afoul of the simplest canon of statutory construction: that a statute usually means what it says. See, e.g., *Perrin v. United*

U.S.C. § 653(b)(4) (Occupational Safety and Health Act). Indeed, in 1983, the proposed amendments to the Labeling and Advertising Act originally included a clause stating that the Act "shall not relieve any person from liability at common law or under state statutory law to any other person" (H.R. 3979, § 5, 98th Cong., 1st Sess. (1983)). The House Committee eliminated the provision from the bill that became the 1984 Act. H.R. Rep. No. 805, *supra*, at 7.



*States*, 444 U.S. 37, 42 (1979); *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975).<sup>24</sup>

### 3. *The Act Sets Forth a Comprehensive Federal Scheme.*

The preemption provision of the Labeling and Advertising Act is part of an integrated and avowedly "comprehensive" scheme (§ 1331) that first defines a delicately balanced policy and then specifies the means to pursue it. Any health-based obligation imposed under state law with respect to the labeling, advertising, or promotion of cigarettes would conflict with the policy and impair the scheme.

The Act begins with a declaration of policy, announcing that it "establish[es] a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health." § 1331. It then sets out the several congressional objectives to be pursued by the Act: "the public [should] be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes" (§ 1331(1)); and "commerce and the national economy [should] be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health" (§ 1331(2)). And far from simply stating these objectives as broad aspirations, the Act specifically ties these ends to its selected means, insisting that the goals will be met and accommodated *through* the federal program established by the Act: the Act creates the program "whereby" the stated goals are to be met, and the objective of providing adequate information is to be accom-

<sup>24</sup> Petitioner has never argued that, if the present version of Section 1334(b) is taken at face value (as it must be), then the scope of preemption was *narrower* for the period from 1966 to 1969. His references to the 1965 Act are, as they have been throughout the litigation, simply attempts to treat the 1969 Act as though it said something else. Moreover, and in any event, as we discuss at pages 20-23, *infra*, the preemptive force of the Act from 1966 through June 1969 was similarly broad.

plished "by" the package warning. § 1331. In short, through the program defined by the Act, consumers are to be warned adequately, the economy is to be protected, and "diverse" and "nonuniform" obligations on labeling and advertising are forbidden, so that commerce will not be "impeded" and consumers will not be "confus[ed]" by varying requirements.

The Act goes on to specify the comprehensive program—a program that is no less comprehensive for not being complex.<sup>25</sup> To furnish the adequate information to consumers, Congress required, on pain of criminal fine or injunction (§§ 1338, 1339), that all packages carry the warning written by Congress in the manner prescribed by Congress ("in a conspicuous place" and "in conspicuous and legible type"). § 1333.<sup>26</sup> With respect to advertising, after provisionally deciding in 1965 that the FTC was not to require any warning, Congress decided in 1969 to allow the FTC to proceed with such a requirement—while keeping the FTC on a short leash in so acting by requiring six months advance notice to Congress. § 1336(a). The same year, Congress banned broadcast advertising of cigarettes, insisting that it rather than the FCC should make this decision. § 1335. From the

<sup>25</sup> *Amici American Cancer Society, et al.* (ACS Br. 6-7), point to the program's simplicity to dispute the Act's assertion that it is "comprehensive." That argument confuses complexity with comprehensiveness. The scheme is simple because the problem being addressed is relatively discrete, and the field relatively narrow. Indeed, with respect to part of the field, Congress decided for a time that no requirements should be imposed at the state or federal level.

<sup>26</sup> The warning was originally prescribed, and revised, pursuant to a congressional determination that the warning must be "short and direct," "factual and succinct." 1965 Senate Report 4. Congress both in 1965 (*id.* at 4, 7) and in 1969 (1969 Senate Report 4) specifically declined to enact lengthier proposed warnings so as not to dilute the message. In 1969, the Senate Committee explained (*id.* at 13) that the longer warning that had passed the House was "so lengthy that it may lose its impact. It might also serve to create consumer confusion. . . . In the committee's view, the proposed warning statement is both scientifically accurate, and sufficiently short and pointed to constitute an effective warning."

beginning, moreover, Congress addressed itself to the question of affirmatively deceptive advertising by preserving, as part of its scheme, the FTC's authority to prevent, regulate, and correct any such practices. § 1336 (b).<sup>27</sup> That authority has in fact been regularly used: the FTC has closely attended to the advertising and promotional activities of cigarette companies. *See, e.g., FTC v. Carter*, 636 F.2d 781 (D.C. Cir. 1980); *FTC v. Brown & Williamson Tobacco Corp.*, 580 F. Supp. 981 (D.D.C. 1983), *aff'd in relevant part*, 778 F.2d 35 (D.C. Cir. 1985); *In re American Brands, Inc.*, 79 F.T.C. 255 (1971); 37 Fed. Reg. 9108 (1972). And, as previously noted (*see* page 17, *supra*), Congress has required and received annual reports on the health consequences of smoking (§ 1337(a)), on the effectiveness of cigarette labeling, and on current advertising and promotion practices (§ 1337(b)).

In all of these ways, Congress put in place a *federal* regulatory scheme to establish and enforce the standards of conduct to be observed by cigarette manufacturers and others in this area. The preclusion of state action thus preserves the required national perspective for the operation of the federal regime—a comprehensive regime designed to provide before-the-fact compliance, prevention, and correction based on federal standards. Congress could count on the fact that consumers would actually receive the warning that Congress deemed adequate (as indeed they have); moreover, because of the inherently public nature and widespread dissemination of advertising and promotional materials, Congress could rely on the FTC to police any misleading advertising or promotion and to report to Congress on advertising practices as well as the effectiveness of the warnings. Unlike state and local

<sup>27</sup> The Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, prohibits unfair or deceptive commercial practices (§ 45) and authorizes the FTC to issue cease and desist orders and to recover civil penalties (§ 45(b), (m)). *See also Amrep Corp. v. FTC*, 768 F.2d 1171 (10th Cir. 1985) (FTC may order corrective measures), *cert. denied*, 475 U.S. 1034 (1986); *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977) (same), *cert. denied*, 435 U.S. 950 (1978).

agencies, the Commission would have the experience, expertise, and sensitivity to the congressional balance to make the required judgments about what representations were truly deceptive, as well as the power to proceed against any violations on a nationwide basis. And under this regime, Congress could reasonably expect that deficiencies would be addressed at the federal level before they caused significant harm.

It has thus been apparent from the inception of the Act that the various States could not—consistent with the goals set by Congress and the means chosen to implement them—establish their own requirements for what cigarette manufacturers must and must not say about smoking and health. As Congress realized, it is not possible to have “a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health” (§ 1331) and, at the same time, have 50 State programs to deal with the same field. Thus, whether looked at in terms of the express language of preemption in § 1334 or in terms of the purposes and scheme set forth by Congress in § 1331 and the rest of the Act, the imposition of additional state requirements or prohibitions in this area cannot stand.<sup>28</sup>

<sup>28</sup> As we noted previously, this broad preemption was necessary even during the brief period before the language of Section 1334 (b) took on its present form. Indeed, the Senate, in proposing the modified language in 1969 (*see* H.R. Conf. Rep. No. 897, 91st Cong., 1st Sess. 4 (1970) (listing new language among Senate changes)), said that the new language merely “clarified” the preemptive effect of the 1965 Act. 1969 Senate Report 12.

The need for clarification was evident from a disparity in views about how far preemption relating to advertising had reached: for example, while the *Banzhaf* opinion suggested that the preemption provision reached only *requirements* of additional statements (405 F.2d at 1090, case discussed in 1969 Senate Report 7), the FCC Chairman himself, and evidently the FCC, expressed the view that the provision also preempted *prohibitions* applicable to advertising, including a ban on broadcast advertising. *See* 115 Cong. Rec. 16170 (1969) (Rep. Eckhardt); 34 Fed. Reg. 1959 (1969); *see also* 1969 House Report 4-5 (FCC proposal intrudes



**II. STATE COMMON LAW IMPOSING DUTIES TO ADD TO, OR SUBTRACT FROM, STATEMENTS WITH RESPECT TO WARNINGS OR ADVERTISING AND PROMOTION IS INCONSISTENT WITH THE LANGUAGE AND POLICIES OF THE LABELING AND ADVERTISING ACT.**

Petitioner cannot help but accept that the Labeling and Advertising Act preempts, in the words of one group of *amici*, "legislative and executive rulemaking—including promulgation of statutes, regulations, ordinances, and rules—by state and local legislatures and agencies." Brief *Amicus Curiae* of National League of Cities, *et al.*, at 6 (NLC Brief). He is thus left with the awkward argument that Congress somehow wanted to close off preemption at that point—that is, to preempt *only* obligations imposed by state "legislative and executive rulemaking," but not obligations imposed by state common law. That idea is utterly without basis: nothing in the Act reveals an intent on the part of Congress to allow States to impose numerous, varying obligations, provided only that they do so through the device of "state common law tort claims." Pet. Br. 13. To the contrary, the preemption provision, and the Act as a whole, show unmistakably that Congress meant to preempt *all* state law imposing a duty to provide more warnings or adding requirements or prohibitions with respect to advertising and promotion.

on field occupied by Congress in 1965 Act), 37-38 (Rep. Moss: 1965 Act preempts "the field of controlling all advertising to the exclusion of the States"), 31 (Reps. Jarman, Dingell, and Adams) (same); 115 Cong. Rec. 16298 (1969) (Rep. Ryan), 16299 (Rep. Preyer) (expressing similar view). The 1969 amendment explicitly provided that requirements *and* prohibitions within this area were preempted, though it limited the preemption to those imposed "under State law." This congressional confirmation of the broader view of the preemptive reach of the 1965 Act is "entitled to great weight." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969); see *Seatrains Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980).

**A. The Imposition of Duties Under the State Common Law of Torts Is Inconsistent with the Language of the Preemption Provision.**

Nothing in the preemption provision of the Act exempts state common law from its scope. As we have discussed, Section 1334(a), by its terms, preempts any attempt (state or federal) to require a different warning on cigarette packages, while Section 1334(b) preempts, with respect to advertising or promotion, any requirement or prohibition "imposed under State law."<sup>29</sup> Although petitioner points out that Congress did not specifically mention "common law tort claims" (Pet. Br. 18), that fact, while true, is beside the point: Congress did not specifically mention *any* kind of state law—including statutory law, which is preempted even in petitioner's view—but chose to rely instead on a term of general application.<sup>30</sup>

It is, in any event, far too late to argue seriously that the term "State law" does not naturally and necessarily include state common law. This Court put that question to rest in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and it has not been revived. See, e.g., *Norfolk & Western Ry.*, 111 S. Ct. at 1163 (The phrase "'all other law, including State and municipal law' is clear, broad, and unqualified. It does not admit of the distinction the Court of Appeals drew, based on its analysis of the legislative history, between positive enactments and common-law

<sup>29</sup> The term "State law" is not the only term of broad application in Section 1334(b). The statutory phrase "with respect to" is similar to the phrase "relates to," which this Court has recently described as "'deliberately expansive' language," which is "'designed to 'establish [the preempted field] as exclusively a federal concern.'" *Ingersoll-Rand*, 111 S. Ct. at 482 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987), and *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)).

<sup>30</sup> Congress chose the phrase "State law" instead of the phrase "State statute or regulation," which passed the Senate. 1969 Senate Report 16; H.R. Conf. Rep. No. 897, *supra*, at 1. The term "regulation" is broad enough to cover common law (see *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)), but the adopted language removed any question on that score.



rules of liability.”); *Illinois v. City of Milwaukee*, 406 U.S. at 100 (“no reason not to give ‘laws’ its natural meaning” including “claims founded upon federal common law as well as those of a statutory origin”). Indeed, this Court has repeatedly found preemption of state common law, including tort law, without requiring any explicit reference to common law in the federal statute. See, e.g., *International Paper, supra*; *de la Cuesta, supra*; *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981); *Chicago & Northwestern Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964); *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525 (1959); *Garmon*, 359 U.S. at 247; *Schwabacher v. United States*, 334 U.S. 182 (1948).<sup>31</sup>

The crux of petitioner’s argument, therefore, is not that state common law is not “State law,” but that the common law of torts does not “require” anything or impose any “requirement[s].” Pet. Br. 19-22. But that argument is fundamentally at odds with the nature of tort law itself. It is, quite literally, hornbook law that the law of torts imposes liability for breach of a legal duty. W. Prosser & W.P. Keeton, *Prosser and Keeton on*

<sup>31</sup> To make a distinction between statutory and common law would also make no practical sense in the present context. For example, express warranty claims like petitioner’s are based on statute (the Uniform Commercial Code). See note 5, *supra*; *Palmer*, 825 F.2d at 622. And monetary damages are quite commonly based on a wide range of state statutes: in addition to wrongful death and worker’s compensation statutes, there is an ever-growing body of statutes that serve to codify, alter, or replace common-law torts, particularly in the area of product liability. See, e.g., N.J. Stat. Ann. § 2A:58C-2 (West 1990) (failure to warn); Mass. Gen. Laws ch. 93A (1984) (same; see *Palmer, supra*); Ind. Code. Ann. § 33-1-1.5-3 (West 1990) (same); Or. Rev. Stat. § 30.920 (1989) (same); S.C. Code Ann. ch. 73 (Law. Co-op. 1976) (same); Tex. Bus. & Com. Code Ann. §§ 17.46, 17.50 (Vernon 1987) (deceptive advertising); Cal. Civ. Code § 45 (Deering Supp. 1990) (libel).

Indeed, if the Act preempted statutory but not common law, the result would be that a tort claim would go from not being preempted to being preempted on the day that a State codified a common law tort, as New Jersey did in 1987 for failure to warn.

*Torts* 4 (5th ed. 1984); *Black’s Law Dictionary* 1489 (6th ed. 1990) (“[t]here must always be a violation of some duty owing to plaintiff”). The duty may be seen as an affirmative one (e.g., a duty to use reasonable care or a duty to warn) or a negative one (e.g., a duty not to market unsafe products or a duty to refrain from misrepresentation). But, in either event, a plaintiff bringing a tort claim is seeking to recover on the ground that the defendant failed to adhere to a required standard of conduct. See *Prosser & Keeton* 21-23.

If petitioner means somehow to suggest that a tort “duty” is nonetheless not a “requirement,” his suggestion fails as a matter of plain English. A “duty” is “[a]n act or a course of action that is *required* of one by position, social custom, law, or religion.” *The American Heritage Dictionary* 431 (1985) (emphasis added). A “requirement,” in turn, is “something that is required” or “something *obligatory*.” *Id.* at 1050 (emphasis added). To complete the circle, an “obligation” is “[a] *duty*, contract, promise, or other social, moral, or legal *requirement* that compels one to follow or avoid a given course of action.” *Id.* at 857 (emphasis added). As a matter of accepted usage, therefore, it is plain that a “duty” and a “requirement” (and an “obligation”) are one and the same.

It is thus entirely natural to find the same usage routinely reflected in tort law. For example, Section 4 of the Restatement (Second) of Torts says that “[t]he word ‘duty’ is used throughout the Restatement of this Subject to denote the fact that an actor is *required* to conduct himself in a particular manner.” (emphasis added). Discussing use of the term “duty” with regard to issues of negligence, the Restatement observes that the term is “particularly valuable in describing the *requirement* that action shall be taken for the protection of the interests of others.” *Id.*, comment *b* (emphasis added). Similar usage is found in connection with torts based upon strict liability, especially those involving a failure to give an adequate warning: “where [a seller] has reason to anticipate that danger may result from a particular use, . . . he may be *required* to give adequate warn-

ing of the danger . . . ." *Id.*, § 402A, comment *h* (emphasis added).<sup>32</sup> It is well recognized, therefore, that, whether defined in terms of fault or not, liability in tort law is based on "a departure from the conduct *required* of the actor by society for the protection of others, and it is the public and social interest which determines what is *required*." *Prosser & Keeton* 22 (emphasis added) (internal footnote omitted).<sup>33</sup>

This common usage does nothing more than reflect common knowledge: that common law regulates behavior just as statutes do. This Court made that very point more than three decades ago in *San Diego Building Trades Council v. Garmon*, 359 U.S. at 247, observing that "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive

<sup>32</sup> The common use of "require" to refer to tort duties is confirmed by the jury instructions in this case, which asked the jury to decide whether respondents were "required" to give warnings prior to 1966. Tr. 12,736, 12,737, 12,740. It is further confirmed by the *amicus* brief for the American Cancer Society, *et al.*, which states (at 5) that the obligations "imposed under state tort law . . . require all manufacturers to take reasonable steps to ensure that consumers receive adequate and non-deceptive information about the dangers of their products." (emphasis added).

Judicial decisions, too, reflect the common usage of "require" and "prohibit" to refer to tort and other duties enforced in private suits for monetary relief. *See, e.g., Gollust v. Mendell*, 59 U.S.L.W. 4619, 4621 (U.S. June 10, 1991) ("[p]rohibiting" short-swing insider trading by "strict liability rule"); *Ingersoll-Rand*, 111 S. Ct. at 484 ("requiring"); *Kalo Brick*, 450 U.S. at 325-26 ("require"); *Scindia Steam Nav. Co., Ltd. v. de los Santos*, 451 U.S. 156, 169-70 & n.16 (1981) (same); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 150 (1964) (same); *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 557 (1960) (same). *Cf. International Paper*, 479 U.S. at 495, 498 n.19 ("compel").

<sup>33</sup> *See Feldman v. Lederle Labs.*, 97 N.J. 429, 452, 479 A.2d 374, 386 (1984) (embracing language of § 402A, comment *j*: "In order to prevent the product from being unreasonably dangerous, the seller may be *required* to give directions or warning, on the container, as to its use.") (emphasis added); *see also O'Brien v. Muskin*, 94 N.J. 169, 180, 463 A.2d 298, 303 (1983); *Spring Motors Distribs. v. Ford Motor Co.*, 98 N.J. 555, 579, 489 A.2d 660, 672 (1985).

relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." More recently, in finding various state tort suits to be preempted by the Clean Water Act, the Court stated that "[t]he inevitable result of such suits would be that Vermont and other States could do indirectly what they could not do directly—regulate the conduct of out-of-state sources." *International Paper*, 479 U.S. at 495; *see id.* at 498 n.19. More recently still, the Court made the point again in a case involving the preemptive effect of ERISA, noting (in language of particular relevance here) that "state courts, exercising their common law powers, might develop different substantive standards applicable to the same employer conduct, *requiring* the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction." *Ingersoll-Rand*, 111 S. Ct. at 484 (emphasis added).

All of this notwithstanding, petitioner and his *amici* offer a number of theories to explain why a duty imposed by state tort law is not a "requirement" after all. They claim, for example, that common law duties cannot be requirements because they are enforced by damages (and not injunctions) and by private parties (not state officials). *See, e.g.,* Pet. Br. 19-20; NLC Br. 7, 9. They also argue that manufacturers subject to common law duties are not required to comply with these duties in any specific way or, indeed, to comply at all—given the "choice" of paying the damages and continuing the unlawful conduct. *See, e.g.,* Pet. Br. 20-21, 42-43; ACS Br. 17-18. None of these efforts succeeds in explaining away the obvious: that common law duties *are* requirements.

To begin with, in asserting that tort suits impose no requirements because they are initiated by private parties and end in damage awards, petitioner and his *amici* have confused two distinct points: whether a requirement exists and how it is enforced. As discussed in subsection IIC, *infra*, each claim in this case is based upon state law imposing a standard of conduct to which the manufacturers are held. The obligations established by those standards are every bit as much "requirements" as any obliga-



tions set by statute, inasmuch as the law attaches consequences to their violation. Whether the consequences are ultimately brought to bear by means of a prohibitory injunction or damages, whether the relief is sought by private parties or by the State, petitioner cannot escape the fact that the manufacturers are being subjected to standards set by, and enforced according to, state law. *See Kalo Brick*, 450 U.S. at 317-18 (preemption turns on “the nature of the activities which the States have sought to regulate rather than on the method of regulation adopted”) (quoting *Garmon*, 359 U.S. at 243).<sup>34</sup>

Petitioner and his *amici* make a comparable, though different, mistake in arguing that a tort duty under common law is not a “requirement” because it does not mandate particular action. Here, they have mixed together the issue of whether there is a requirement with the issue of how specific it may be. In a failure to warn case, for example, the common law imposes upon manufacturers a duty to warn consumers about the dangers of using their products. That duty is a legal requirement, plain

<sup>34</sup> The theories put forth by petitioner are not even sound on their own merits. Tort duties are, in fact, often enforceable by injunction and by state officials. As to the former, see *Restatement (Second) of Torts* ch. 48 (1965) (injunctions); *id.* at 556-58 (Scope Note). As to the latter, state attorneys general typically not only have *parens patriae* power to bring suits to protect state residents (see, e.g., *Alfred L. Snapp & Sons, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982); *State Dep’t of Envtl. Protection v. Jersey Cent. Power & Light*, 69 N.J. 102, 351 A.2d 337 (1976)) but also have widely recognized authority to bring suit to protect the public against violations of common law duties—notably, to prevent misrepresentations to consumers (e.g., *Hyland v. Kirkman*, 157 N.J. Super. 565, 385 A.2d 284 (Super. Ct. Ch. Div. 1978); *Lowell Gas Co. v. Attorney General*, 377 Mass. 37, 385 N.E.2d 240 (1979); *State v. First Nat’l Bank*, 660 P.2d 406 (Alaska 1982); *Kilgore v. Younger*, 30 Cal. 3d 770, 797, 640 P.2d 793, 809, 180 Cal. Rptr. 657, 673 (1982)). In addition, most state attorneys general have specific power to enforce statutes barring deceptive advertising (the same statutes that may underlie private damages suits for misrepresentation, see, e.g., Tex. Bus. & Com. Code Ann. §§ 17.46, 17.50 (Vernon 1987)). See N.J. Stat. Ann. § 56:8-1 *et seq.* (West 1990); L. Ross, *State Attorneys General: Powers and Responsibilities* 207-11 (1990).

and simple. State law could, of course, go on to impose more specific requirements—as, for instance, the Labeling and Advertising Act does, actually detailing what the exact warning must be—but the absence of such *specific* requirements does not change the fact that a *general* requirement exists. That is all that is needed (“no requirement or prohibition”) to bring state law within the preemptive scope of the Act. *See Garmon*, 359 U.S. at 244 & n.3 (preemption applies equally to “specialized” statute and to “tort law of general application”).<sup>35</sup>

Petitioner and his *amici* also insist that state tort law does not “require” anything because, as they see it, manufacturers can just pay the damages and ignore the duty. But even if the premise were correct (which it plainly is not, as discussed below), it would not make the duty any less of a duty. A manufacturer could likewise decide that it was willing to pay repetitive fines for violation of a statutory duty, but that choice would not mean that the duty would then cease to exist. Indeed, short of remedies that make it physically impossible to disobey the law (e.g., the jailing of individuals), persons and corporations always have a choice between compliance and accepting the consequences of disobedience. To say that, in every such case, compliance is “voluntary” and not “re-

<sup>35</sup> *Amici Curiae National League of Cities, et al.* (NLC Br. 28 & n.23), tries to find a partial avenue of escape through the words “based on smoking and health.” But even petitioner uses that phrase interchangeably with “health-related” (Pet. Br. 15 n.17), as does, for example, the 1969 Senate Report (at 1). In any event, there is no indication in the Act that Congress was unconcerned about health-based requirements that forced changes in warnings or in advertising materials, provided that they were based on more broadly defined duties that did not specifically target smoking and health—requirements that ultimately would still be “based on smoking and health” in the ordinary sense of those words. On the contrary, it seems evident, and petitioner himself does not deny, that Congress meant to foreclose States from applying even their general laws if they would have the *effect* of imposing such requirements. Of course, all of the claims before this Court involve allegations that respondents breached duties with regard to information about smoking and health.



quired" is to take a very peculiar view of the compulsive force of legal obligations.<sup>36</sup>

This Court, quite understandably, has declined to take that view. In repeatedly finding preemption of common law actions for damages, it has necessarily rejected the notion that the obligation to pay damages need not force any change in conduct. For example, in *WDAY, Inc.*, 360 U.S. 525, the Court could have permitted a libel suit against a broadcast station for broadcasting material required by federal law, reasoning (along the line pressed by petitioner) that the station was free to do both: broadcast the material and then pay any ensuing damages to the injured parties. Similarly, in *Kalo Brick*, 450 U.S. 311, the Court could have declined to find preemption on the ground that the railroad was not "prohibited" by the threat of tort damages from abandoning a disputed rail line (as required by the ICC), having instead the option to abandon the line anyway and pay damages for that action. And in *International Paper*, 479 U.S. 481, the Court could have held that state tort actions were not preempted because they do not "compel" any change in conduct whatsoever and, hence, do not "regulate" the defendants' out-of-state discharges. Yet the Court did nothing of the kind: in each of those cases, the Court found preemption of the state action without regard to the existence of this hypothetical "choice."<sup>37</sup>

<sup>36</sup> It seems utterly illogical, for example, to think that a statute providing for a \$100 fine would compel a change in behavior but potentially limitless awards of damages under common law would not. Yet if petitioner means that no state law providing for monetary sanctions is preempted (because anyone could just pay and go on as before), he is largely reading Section 1334 out of the Act.

<sup>37</sup> There might conceivably be circumstances—involving, for example, a one-time event or relatively *de minimis* sanctions—where it would be rational to expect a manufacturer simply to absorb the cost of a monetary award. Cf. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 186 (1988) (employer might pay one-time worker's compensation award without complying with state safety standard). Whatever the scope of those circumstances, however, they cannot extend to a situation in which prospective plaintiffs will challenge

Hypotheticals aside, it is fanciful to think that any manufacturer can indefinitely pay damages, perhaps including punitive damages, without conforming to the required standard. Responding to this very argument in a suit like the present one—that "any monetary damages awarded would not compel a manufacturer to change its label for, after all, 'the choice of how to react is left to the manufacturer'"—the First Circuit remarked: "This 'choice of reaction' seems akin to the free choice of coming up for air after being underwater." *Palmer*, 825 F.2d at 627. The First Circuit went on to recognize that, in the real world, "[o]nce a jury has found a label inadequate under state law, and the manufacturer liable for damages for negligently employing it, it is unthinkable that any manufacturer would not immediately take steps to minimize its exposure to continued liability." *Id.* at 627-28; see also P. Huber, *Liability: The Legal Revolution and Its Consequences* (1988).<sup>38</sup> To use again the words from *Garmon*, "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy" (359 U.S. at 247); and the use of that method to control policy can defeat efforts

the same continuing course of conduct over several decades and seek compensatory and punitive damages without any ascertainable limit.

<sup>38</sup> The court thus found the tort claims in that case to be barred, noting that "[e]ffecting such a change in the manufacturer's behavior" by force of law "is the very action preempted by § 1334 of the Act." *Palmer*, 825 F.2d at 627-28. Accord, *Pennington*, 876 F.2d at 420-21; *Roysdon*, 849 F.2d at 234-35; *Stephen*, 825 F.2d at 313; Pet. App. 106a; *Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655, 659 (Minn. 1989).

Indeed, a manufacturer's choice not to change its conduct after adverse jury verdicts could well give rise to punitive damages. Such damages, of course, are not compensatory at all, but directed solely at retribution for and deterrence of misconduct, and therefore would not come within even petitioner's view that compensatory relief is non-regulatory. See *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1044-45 (1991); *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 47 (Alaska 1979), modified, 615 P.2d 621 (1980), cert. denied, 454 U.S. 894 (1981).

by Congress to establish federal policy, just as much as a statute or an administrative regulation could do.<sup>39</sup>

**B. The Imposition of Duties Under the State Common Law of Torts Is Inconsistent with the Scheme and Policies of the Labeling and Advertising Act.**

As we have discussed (*see* pages 14-23, *supra*), Congress made quite clear in the Labeling and Advertising Act that it did not want manufacturers to be subject to state-by-state requirements based upon what each State thought to be appropriate messages about smoking and health. Rather, Congress deliberately chose to put into place a national solution to a national problem. *See* pages 15-16 and note 17, *supra*. What petitioner proposes—allowing the States to impose additional obligations under their common law—would effectively undo that solution.

**1. State Tort Law Would Interfere with the Policies of the Act.**

To start with, to have warnings and advertising material controlled by the law of every State would “create chaotic marketing conditions” (1965 Senate Report 4), directly contrary to the stated aim of protecting commerce from “diverse” and “nonuniform” regulations. § 1331. The FTC has pointed out, for example, that if States could require their own warnings in cigarette advertisements, “[t]his would make it virtually impossible to advertise cigarettes on a national basis.” Letter to Rep. Thomas A. Luken (June 17, 1988) at 6. The same barrier, in fact, would naturally be created by *any* health-related requirement or prohibition imposed on the content of advertising from State to State. The alter-

<sup>39</sup> We do not understand petitioner to dispute that a statute requiring an additional cigarette warning, enforceable by a private cause of action for damages, would be preempted by the plain language of Section 1334. Given that fact, it would attribute to Congress an irrational intent to hold that the same cause of action is permitted when the source of the duty is state common law. *See* note 31, *supra*.

native would be for manufacturers to abandon national marketing altogether and to package and advertise their products according to the varying standards of each State. But this state-enforced disuniformity, as Congress anticipated, would create significant obstacles to “commerce and the national economy.” § 1331.<sup>40</sup>

The fact that state *common* law would be imposing the additional requirements only makes matters worse. Under that system, manufacturers would be subject to different standards of conduct applied retroactively on an *ad hoc* basis by judges and juries throughout 50 States. Any particular verdict would leave the next jury in the next case free to reach its own judgment, even about conduct that the manufacturer adopted in response to the previous verdict. That uncertainty is aggravated by the fact that each verdict itself gives a manufacturer little precise guidance about how to meet its obligations, typically telling it only what was not adequate, not what would be. Thus, while one jury might conclude that the federal warning was *not* sufficient or that advertisements showing attractive smokers were “misleading,” such a judgment would not establish that any particular warning *was* sufficient or that different advertisements (for instance, showing attractive landscapes) were acceptable. In short, the common law would impose requirements by trial and error, a much more disruptive process than the setting of requirements (concededly preempted) by a state legislature. *See International Paper*, 479 U.S. at 496 (common law rules “often are ‘vague’ and ‘indeterminate’” and “would undermine the important goals of efficiency

<sup>40</sup> *See, e.g.*, 1965 Senate Report 4; 1965 House Report 4; 111 Cong. Rec. 13901 (1965) (Sen. Moss), 14408 (Rep. Smith), 14411 (Reps. Rumsfeld and Springer), 14414 (Rep. Nelsen), 13893 (Sen. Magnuson); 1965 Senate Hearings 166-67 (Dr. Thomas Carlile, Chairman, Committee on Tobacco and Cancer of the American Cancer Society); *Cigarette Labeling and Advertising—1965: Hearings Before the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 1st Sess. 70 (1965) (FTC Chairman Paul Rand Dixon) [“1965 House Hearings”].



and predictability"); *Ingersoll-Rand*, 111 S. Ct. at 484 ("different substantive standards" imposed by common law decisions would be "fundamentally at odds with the goal of uniformity").

To have obligations imposed by state common law would also make statements relating to smoking and health more "diverse" and more "confusing." In the scheme adopted by Congress, the warnings required of manufacturers are, and are designed to be, clear and straightforward. Equally important, they are the same regardless of the particular manufacturer or the particular brand. The simplicity of this program is anything but accidental. Congress rejected proposals to require more elaborate warnings, on the ground that they would detract from, not add to, the strength of the existing warning. See note 26, *supra*.

What petitioner suggests, however, would turn the federal program into nothing more than a starting point, leaving juries free to conclude, on the basis of the evidence in a single case, that Congress was mistaken. It is not difficult to imagine that, as this process plays out, juries in different States would subject different manufacturers to different standards, perhaps even with respect to different brands or types of cigarettes. The result would be that, in addition to the federal warning, the public would be confronted with a whole universe of warnings, depending upon the points emphasized in particular suits, against particular defendants, before particular juries. Petitioner seems to think that more warnings are always better; but that is, most emphatically, not the view taken by Congress in the Labeling and Advertising Act. Instead, Congress believed, and implemented a plan "whereby," the public was informed by means of a simple, clear, unvarying (or, now, rotating) statement.<sup>41</sup>

<sup>41</sup> Congress was of the opinion that an effective warning had to be succinct: lengthy warnings would quickly obscure the "short and direct" cautionary statement that Congress felt to be necessary. 1965 Senate Report 4; see note 26, *supra*. Cf. *TSC Indus., Inc. v.*

Petitioner contends that Congress was willing to sacrifice uniformity and clarity in order to provide consumers with an adequate warning: according to petitioner, the former were merely "secondary" goals to be pursued only "to the maximum extent consistent with" (§ 1331) the latter, "primary" goal of the Act. Pet. Br. 37-40; ACS Br. 20; see *Carlisle v. Philip Morris, Inc.*, 805 S.W.2d 498 (Tex. Ct. App. 1991); *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 577 A.2d 1239 (1990). If that argument were correct, it presumably would mean that state legislatures (as well as courts) could impose requirements and prohibitions to advance the "primary" goal (a position not taken by petitioner); but, in any event, the argument is not correct. First of all, the language on which petitioner relies ("to the maximum extent consistent with this declared policy," § 1331(2)(A)) does not even apply to the declared goals of avoiding "diverse, nonuniform, and confusing" regulations (§ 1331(2)(B)). More broadly, the argument utterly misapprehends the nature of the Act: aside from ignoring that a loss of uniformity and clarity hardly *advances* the goal of providing an adequate warning, it erroneously assumes that Congress defined a federal goal of providing adequate warning to consumers and left the methods of achieving that goal unspecified. But Congress expressly said that it was carrying out the policy of "adequately inform[ing]" consumers "by inclusion of warning notices" (§ 1331 (emphasis added)) and, beyond that,

*Northway, Inc.*, 426 U.S. 438, 448-49 (1976) ("management's fear of exposing itself to substantial liability may cause it simply to bury the [public] in an avalanche of trivial information—a result that is hardly conducive to informed decisionmaking"); *Cotton v. Buckeye Gas Prods. Co.*, 840 F.2d 935, 938 (D.C. Cir. 1988) (excessive warning may be self-defeating); *Finn v. G.D. Searle & Co.*, 35 Cal. 3d 691, 701, 677 P.2d 1147, 1153, 200 Cal. Rptr. 870, 876 (1984) (same); *Andre v. Union Tank Car Co.*, 213 N.J. Super. 51, 66-70, 516 A.2d 277, 285-86 (Super. Ct. Law. Div. 1985), *aff'd*, 216 N.J. Super. 219, 523 A.2d 278 (Super. Ct. App. Div. 1987) (same); Magat, Viscussi, & Huber, *Consumer Processing of Hazard Warning Information*, 1 J. Risk & Uncertainty 201 (1988).



carefully defined the means "whereby" the balance of the Act's several goals was to be achieved ("the comprehensive Federal program," § 1331). It is not up to the States, therefore, to seize upon one goal identified by Congress and fashion a state program (statutory or common law) to advance that single goal, regardless of the effect on other goals or on the methods specified by Congress for pursuing the balanced objectives of the statute. See, e.g., *International Paper*, 479 U.S. at 494 ("[I]t is not enough to say that the ultimate goal of both federal and state law is to eliminate water pollution. A state law also is preempted if it interferes with the methods by which the federal statute was designed to reach this goal.").<sup>42</sup>

The decision by Congress to set the policy in this field—and itself to balance the several goals of the Act—reflects the fact that Congress alone has the broad perspective, both practical and political, to ensure that none of the goals is pursued to the exclusion of the others. For example, in initially deciding not to require warnings in advertisements, and in twice deciding to forestall efforts by the FTC to do so, Congress exhibited a strong concern that such measures would simply go too far—that is, that such warnings would have too great an impact on the interest in protecting the national economy.<sup>43</sup> Pursuant to the scheme that it established, Con-

<sup>42</sup> See also *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) ("[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."); *Jones v. Rath Packing Co.*, 430 U.S. 519 (state law would interfere with federal goal of uniformity).

<sup>43</sup> Although petitioner pays little heed to this latter interest, Congress paid considerably more. The legislative history is filled with references to the fact that the tobacco industry employs thousands of workers and accounts for billions of dollars in sales and tax revenues. See, e.g., 1965 Senate Hearings 396-97 (Sen. Ervin); 111 Cong. Rec. 13897-98 (1965) (Sen. Bass), 14410

gress continued to monitor this issue, first acquiescing in action by the FTC to impose such a requirement and eventually including a requirement in the statute itself. At all times, however, Congress made clear that it retained, and was willing to use, the ultimate power to step in and to allow or foreclose regulation as it saw fit. See *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) ("[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate."); *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Bd.*, 474 U.S. 409, 422 (1986) (same).

Nothing could be less compatible with this program than a system in which individual juries decide what a manufacturer must and must not say. At best, each jury, guided by the state common law, would be left to balance the competing interests for itself, without regard for the weight assigned to them by Congress. But it may also be that juries would not be told anything at all about protecting commerce or avoiding diverse, nonuniform, and confusing regulation, much less how to weigh those interests. (While such concerns might conceivably be taken into account by state legislatures or administrative agencies—themselves *barred* from striking their own balance—they are not a likely component of jury verdicts.) The policies ascendant in the common law of each State, therefore, would inevitably supplant the national policies established by Congress.<sup>44</sup>

(Rep. Chelf); 115 Cong. Rec. 16189-91 (1969) (Rep. Edwards), 16193-94 (Rep. Fountain), 16294 (Rep. Abbitt).

<sup>44</sup> As the Third Circuit observed in this case, "claims relating to smoking and health that result in liability for noncompliance with warning, advertisement, and promotion obligations other than those prescribed in the Act have the effect of tipping the Act's balance of purposes and therefore actually conflict with the Act." Pet. App. 106a.

## 2. Congress Has Not Authorized Interference with Its Policies.

Petitioner nevertheless advances (Pet. Br. 43-44) the implausible idea that Congress was willing to tolerate frustration of its policies by state tort law. But, if that were truly so, we should not have to guess at it; Congress could easily have done what it did not: include a savings clause, expressly preserving the right to recover at common law (notwithstanding frustration of its policies). Given the fact that Congress broadly preempted "requirement[s] and prohibition[s] . . . imposed under State law," and given that Congress did not include a savings clause to preserve any particular type of state law, it seems quixotic to suggest that Congress nevertheless meant to "save" state law that frustrates the express purposes of the Act. That suggestion, in fact, contradicts the basic rationale of implied preemption doctrine: that Congress does *not* intend to accept frustration of its objectives absent some clear indication to that effect. See L. Tribe, *supra*, § 6-25, at 481 n.14 (quoted at note 14, *supra*).

The suggestion seems even more anomalous in light of the fact that, in the very few cases finding preemption of statutes and regulations but not preemption of liability under common law, this Court has placed considerable emphasis on the existence of a savings clause or its practical equivalent. Thus, for example, in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), the Court relied centrally on a provision of the Price-Anderson Act, 42 U.S.C. § 2210 (1982), that, in setting a cap on tort damages for those injured in nuclear accidents, expressly embodied "Congress[']s assum[ption] that persons injured by nuclear accidents were free to utilize existing state tort law remedies" (464 U.S. at 252). Resolving the only question presented in the case, the Court then held that, pursuant to that functional equivalent of a savings clause, those persons could use the remedy of punitive damages as well. In *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, the Court allowed recovery of supplemental workers' compensation awards against a federal contractor, but

the ruling was based on a statute that expressly permitted enforcement of workers' compensation awards in a federal facility "to the same extent" as if the facility were not federal, 40 U.S.C. § 290.<sup>45</sup> Here, unlike in *Silkwood* and *Goodyear Atomic*, there is no statutory provision whatever expressing an intent to allow application of state law in the form of continuing tort actions.<sup>46</sup>

Lacking an actual savings clause or any statutory equivalent, petitioner tries to fashion a makeshift one, using bits and pieces of legislative history. Pet. Br. 29-30, 33-36. But the statute here is unambiguous, in that only one interpretation is consistent with the ordinary meaning of the statutory language and with the structure and policies of the statute as a whole. In these circumstances, "judicial inquiry is complete." *Burlington N.R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); see *Norfolk & Western Ry.*, 111 S. Ct. at 1163. Indeed, it is hard to see how the legislative history *could* establish on the part of Congress as a whole a "clearly expressed legislative intention to the contrary" (481 U.S. at 461 (quoting *United States v. James*, 478 U.S. 597, 606 (1986))), where the proposed contrary interpretation

<sup>45</sup> In *Goodyear Atomic*, moreover, not only were the amounts of the supplemental awards so small as to create only "incidental regulatory pressure" (486 U.S. at 186), but there was no question of frustrating specific federal decisions addressed to the same subject (scaffold construction) addressed by the State: the question was only one of potential frustration of exclusive federal *ability* to address safety issues.

<sup>46</sup> Similarly, the Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. § 4401 *et seq.*—aside from lacking a guiding statement of purpose like § 1331 and as broad a preemption provision as § 1334—contains an express savings clause that provides: "Nothing in this [Act] shall relieve any person from liability at common law or under State statutory law to any other person." 15 U.S.C. § 4406(c). That provision only highlights the absence of a comparable savings clause in the present Act. See, e.g., *United States v. Rojas-Contreras*, 474 U.S. 231, 234-35 (1985); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 21 (1979). See also note 23, *supra*.



would not only be inconsistent with the statutory language but frustrate the policies declared both in the statute itself and throughout the legislative history. See *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907) (an "act cannot be held to destroy itself").

In any event, petitioner's evidence has little weight even on its own terms, much less when judged against the repeated statements of exclusive federal control, and plenary preemption, within the field. Petitioner cites no supporting statement from any committee report (the best non-textual evidence of any collective understanding); nor does he cite any direct assertion by a legislative sponsor that the preemption provision of the Act was not intended to reach tort suits.<sup>47</sup> Petitioner does point (Pet. Br. 29-30) to the fact that legislative discussion sometimes focused on preemption of legislative and administrative measures, although it was typically sweeping in its description of preemption.<sup>48</sup> But that fact is neither surprising (because such state action presented the most immediate and pressing concern at the time<sup>49</sup>) nor signifi-

<sup>47</sup> Among the types of legislative history, the Court has stressed that Committee Reports are the most authoritative. *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986); *Garcia v. United States*, 469 U.S. at 76. The Court has sometimes relied on the statements of sponsors. See, e.g., *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 225 (1986).

<sup>48</sup> As to the broad descriptions of preemption, in addition to the statutory language, see, e.g., 1969 Senate Report 1 ("any State or local authority"), 1965 Senate Report 6 ("all Federal, State, and local authorities"), 1969 Senate Hearings 80 (Mr. Cullman: "any Federal agency, State, or local government"), and 1965 House Hearings 292 (Mr. Gray: any "Federal, State, or local authority"). See also note 22, *supra* (jury is governmental authority).

<sup>49</sup> As noted above (page 15, *supra*), it was state and local legislative and administrative initiatives that were widely being proposed in 1965. Before that time, and indeed at least through the 1970s, there had been very few damages actions against cigarette manufacturers, and none alleging harm from properly manufactured cigarettes (i.e., without a foreign substance introduced into the cigarette) had ever resulted in liability. See Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. Cal. L. Rev. 1423, 1425 (1980).

cant (because Congress deliberately used broad, inclusive terms in the Act itself). All that petitioner has left, therefore, is the fact that a few isolated comments by a few individual Members and witnesses at hearings can be construed as reflecting a belief that some damages actions might survive.<sup>50</sup> Even aside from the unreliability of such statements as guides to overall congressional intent (*Garcia*, 469 U.S. at 76 ("[w]e have eschewed reliance on the passing comments of one Member")), the fact remains that "unenacted approvals, beliefs, and desires are not laws." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988).

<sup>50</sup> We discuss briefly the statements relied on by petitioner. Pet. Br. 33-36. (1) Rep. Fascell, who was neither a sponsor of the legislation nor one of the conferees, did not expressly discuss preemption. 111 Cong. Rec. 16543-44 (1965). (2) Mr. Ellenbogen, one witness at one hearing, notes at the very page cited by petitioner that he had "not made a real study" of the liability issue and agreed with a suggestion that the cigarette companies might well view the Act as serving "to relieve them from liability and from bothersome and expensive lawsuits." 1965 House Hearings 176. (3) Mr. Cullman, an industry spokesperson, made clear in the exchange excerpted by petitioner that he was referring to pre-1966 suits and that, since he was "not a lawyer," he was merely denying the accusation that the industry had supported the warning in order to relieve it of liability—denying it on the ground that the industry had been "opposed to" the warning. *Cigarette Labeling and Advertising—1969: Hearings Before the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 1st Sess. 580 (1969); *id.* at 577-80. (4) Rep. Watson, after offering his casual reading of the 1965 Act in 1969, referred to the fact that other Members were "apprehensive that the present law might preempt such a right" to sue at common law and, as noted below, took a similar view. *Id.* at 582.

That petitioner's evidence is hardly authoritative is confirmed by statements made by a number of Members suggesting that the 1965 Act precluded, or the 1969 Act would preclude, common law actions against cigarette manufacturers. See, e.g., *id.* at 582 (Rep. Watson: 1969 Act "in all probability would prevent any common law action"); *id.* at 577-81 (Reps. Moss and Dingell); *cf.* 115 Cong. Rec. 16165 (1969) (Rep. McDonald) (in discussion of advertising regulation, evidently referring to manufacturers' increasing disclosure duties under common law).



In short, nothing in the legislative history overrides the plain import of the Act itself.

Lastly, petitioner tries to get at the matter by saying that Congress would not have taken away a remedy for unlawful conduct. But Congress, on numerous occasions, has preempted state remedies without incorporating a similar remedy in the federal scheme.<sup>51</sup> Furthermore, petitioner has mischaracterized what Congress did. In the Act, Congress marked out, within the covered field, what conduct was lawful and what was not: thus, Congress itself set federal standards to which manufacturers must conform, at the same time barring the States from setting other (either more lax or more stringent) standards. It stands to reason that, if the States may not impose additional requirements or prohibitions, they likewise cannot provide "remedies" based upon a failure to comply with additional requirements or prohibitions.<sup>52</sup> The States remain free, of course, to extend remedies for conduct that is outside the coverage of the Act (*see* page 14, *supra*, and note 54, *infra*), but they may not go further and override the judgment made by Congress about the extent of legal obligations to be imposed on manufacturers.

The absence of state damage awards will not mean, as petitioner contends, that cigarette companies can nullify the warning or make misrepresentations with impunity.

<sup>51</sup> See, e.g., *Pilot Life*, 481 U.S. at 55; *Wisconsin Dep't of Indus. v. Gould, Inc.*, 475 U.S. 282, 287, 289 (1986); *Kalo Brick*, 450 U.S. at 322-23; *WDAY, Inc.*, 360 U.S. at 535; cf. *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). See also *United States v. Smith*, 111 S. Ct. 1180 (1991) (preemption of state tort claims against federal officer even if no remedy against United States under FTCA).

<sup>52</sup> Petitioner cannot properly argue that the inclination of States to provide a remedy should be given priority over the federal program. As this Court pointed out in *Garmon*: "Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme." 359 U.S. at 246-47. See note 13, *supra* (purpose of state law cannot save it if effect is to frustrate federal law).

Petitioner simply ignores the fact that Congress and the FTC may deal with any behavior of that nature, should it occur. In the Act, Congress not only confirmed the authority of the Commission to regulate "unfair or deceptive acts or practices in the advertising of cigarettes," it required the Commission to make annual reports concerning "(A) the effectiveness of cigarette labeling, (B) current practices and methods of cigarette advertising and promotion, and (C) such recommendations for legislation as it may deem appropriate." §§ 1336, 1337. In addition to expecting the FTC to remedy any unfair or deceptive advertising or promotion that might undermine the effectiveness of the mandated warnings, Congress thereby indicated its own intention to monitor promotional practices within the industry and to authorize additional action if that should prove necessary.<sup>53</sup> The question, therefore, is not *whether* misconduct will be regulated, but *by whom* it will be regulated. Under the Act, that responsibility rests with the federal government, not the various States.

### C. The Claims Before This Court Are Preempted.

We do not contend, of course, that the Labeling and Advertising Act preempts every possible claim that might be brought against cigarette manufacturers.<sup>54</sup> But all of the claims in this case—involving, as they do, attacks on

<sup>53</sup> The FTC has in fact closely regulated cigarette advertising and promotion. See page 22, *supra*. Moreover, each of the FTC's annual reports since the 1965 Act has contained a section informing Congress about current advertising and promotional practices by the industry, and Congress has relied on them in revising the statutory scheme. See note 19, *supra*.

<sup>54</sup> Thus, for example, as we have already indicated, a design-defect claim alleging the existence of a safer alternative design would not be preempted, at least to the extent that it did not implicate the warnings or information given to consumers. It is simply inaccurate, therefore, to say (Pet. Br. 43) that if the Act preempts common law as well as statutory law, manufacturers will be able to escape liability for actions like deliberately introducing harmful additives into their products.

warnings given by manufacturers or on their advertising and promotional practices—are preempted.

The basic claim at issue here alleges a failure to warn of the health effects of smoking. That claim, whether framed in terms of negligence or strict liability, asserts that respondents failed to fulfill a duty to warn consumers adequately about possible hazards of using their products. *Restatement (Second) of Torts* § 402A, comment j (“In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use.”); *Feldman*, 97 N.J. at 452, 479 A.2d at 386. It effectively asks a jury to find that the warnings given by respondents—the very warnings that Congress has written and ordered respondents to provide—were inadequate under state law. Indeed, that is just what the judge told the jury in this case (with respect to the pre-1966 claims): “you are not limited by the language of the warning required by Congress. . . . [Y]ou are free to determine what the warnings should have been. You may determine that a greater or lesser warning was required prior to 1966.” Tr. 12,737.<sup>55</sup>

It is bizarre to think that Congress, which elected to require one particular warning and even wrote the warning itself, meant to allow individual juries throughout the country “to determine what the warnings should have been” or “to determine that a greater or lesser warning was required.” But that, of course, is the ultimate issue in every failure-to-warn case. The language of Section 1334—“[n]o statement relating to smoking and health . . . shall be required” and “[n]o requirement or prohibition based on smoking and health shall be imposed”—simply does not allow for States to demand, by means of

<sup>55</sup> The trial judge gave this instruction in an effort to indicate that, as far as pre-1966 claims were concerned, the jury could determine what warning was required without being constrained by the choice made by Congress as part of the regulatory scheme established by the Act. If petitioner were to prevail here, the same sort of instruction presumably would be sought for post-1965 claims as well.

tort suits or anything else, that manufacturers give additional warnings about the relationship between smoking and health. And, the language of Section 1334 aside, to require additional warnings pursuant to state law would be flatly inconsistent with the “comprehensive Federal program” whereby consumers are to be “adequately informed” by means of the warning required by federal law. Thus, the court of appeals in this case, in common with every federal court of appeals that has decided this issue, correctly held that the failure-to-warn claims are preempted. See Pet. App. 106a.<sup>56</sup>

The remaining claims (express warranty, intentional misrepresentation, and conspiracy) fare no better. All of them attack advertising and promotional materials based on the assertion that they make false or deceitful communications about the health effects of smoking, irrespective of the existence of the warning. All of them, therefore, are expressly preempted by Section 1334(b), which bars any health-based “prohibition” or “requirement” with respect to advertising or promotion of properly labeled cigarettes. That language, on its face, could not more clearly block States from imposing either affirmative or negative duties regarding such activities. And even were the language less plain, it is self-evident that to permit States to set varying standards with regard to advertising—saying, for example, that certain advertisements could not be run within a particular State—

<sup>56</sup> The Third Circuit stated: “where the success of a state law damage claim necessarily depends on the assertion that a party bore the duty to provide a warning to consumers in addition to the warning Congress has required on cigarette packages, such claims are preempted as conflicting with the Act.” Pet. App. 106a. See *Pennington*, 876 F.2d 414; *Roydon*, 849 F.2d 230; *Stephen*, 825 F.2d 312; *Palmer*, 825 F.2d 620. See also *Gianitsis v. American Brands, Inc.*, 685 F. Supp. 853 (D.N.H. 1988); *Kotler v. American Tobacco Co.*, 685 F. Supp. 15 (D. Mass. 1988), *aff’d*, 926 F.2d 1217 (1st Cir. 1990), *cert. pending*, No. 90-1473 (filed March 19, 1991); *Gunsalus v. Celotex Corp.*, 674 F. Supp. 1149 (E.D. Pa. 1987); *Forster*, 437 N.W.2d 655; *Hite v. R.J. Reynolds Tobacco Co.*, 396 Pa. Super. 82, 578 A.2d 417 (Super. Ct. 1990); *Phillips v. R.J. Reynolds Indus., Inc.*, 769 S.W.2d 488 (Tenn. Ct. App. 1988).



would lead to just the sort of diverse, nonuniform, state-by-state obligations that Congress meant to preclude. Thus, as a matter of both plain language and express statutory policy, those claims are incompatible with the Act.

Petitioner makes a fallback argument (Pet. Br. 45-50) that, even if the Act preempts some tort claims in this area, it does not preempt "intentional torts."<sup>57</sup> But this line between preempted and unpreempted claims is entirely imaginary. Most particularly, in drawing the line petitioner takes no account of (indeed, does not even refer to) the broad language of Section 1334(b), which admits of no exception whatever based on "intent." Moreover, if the Act were read to exempt prohibitions with regard to certain kinds of "intentional" misconduct, then it would follow that the exemption would extend to such prohibitions under any kind of state law, tort or not. That would mean that each of the 50 state legislatures could establish an administrative agency with power to review cigarette advertising and to prohibit, or fine manufacturers for including, any material deemed "intentionally" misleading (except, presumably, the warning itself). It is simply inconceivable that Congress meant to permit such overlapping schemes to exist, given the fact that it explicitly and unequivocally preempted *any* prohibition under state law with respect to the advertising and promotion of properly labeled cigarettes. See Pet. App. 90a (quoting *id.* at 106a) (finding intentional tort claims preempted because they "manifestly 'challenge[] . . . the propriety' of the defendants' 'actions with respect to the advertising and promotion of cigarettes'").<sup>58</sup>

<sup>57</sup> We note that this fallback proposal does not cover petitioner's express warranty claim, because no proof of intentional misrepresentation is required to recover on that claim. See Tr. 12,747 (jury instruction: "It is not a defense for Liggett to claim it was unaware that the statements [the alleged warranties] were untrue").

<sup>58</sup> Although petitioner relies heavily on *Forster v. R.J. Reynolds Tobacco Co.*, *supra*, the analysis in that decision is no more sound than that put forward by petitioner. The court in *Forster* neither comes to grips with the language of Section 1334(b) nor satisfac-

Even apart from the language of Section 1334(b), moreover, the line proposed by petitioner is indefensible. To sustain it, petitioner must be able to establish that, for purposes of the Act, challenges to statements in advertising and promotional materials can be viewed separately from challenges to the warning (which, for purposes of the line, he admits are preempted). But whether any particular statements are actually misleading does not depend just on the statements themselves, but on their effect in the context of all information available to consumers, *including the warning*. By the same token, it is clear that Congress did not consider the adequacy of the warning in a vacuum, without regard to what cigarette manufacturers said in advertising and promotion: to the contrary, in drafting the warning, it was well aware of the nature and extent of existing advertising and promotion.<sup>59</sup> It must be assumed, therefore, that Congress believed that the federal warning would not be rendered inadequate by affirmative statements in advertising and promotion, given that Congress explicitly relied upon the FTC to sanction such statements if they were deemed misleading.

In short, Congress established its own carefully designed system to regulate this area and to preclude both positive and negative state obligations. Petitioner and his supporting *amici* plainly would prefer a different system. But they should not be allowed to rewrite the Labeling and Advertising Act in order to incorporate that preference.

torily explains why Congress would carve out this exception to its preemption of state law. Its attempt at the latter—saying that, otherwise, manufacturers would have a "license to lie" (437 N.W.2d at 662)—simply disregards the FTC's authority, specifically reaffirmed by Congress, to deal with any such conduct. See pages 44-45, *supra*.

<sup>59</sup> See, e.g., 1965 Senate Report 22 (quoting FTC statement that "the Commission has reason to believe that much current advertising suggests or portrays cigarette smoking as being pleasurable or desirable; compatible with physical health, fitness, or well-being; or indispensable to full personal development and social success"); *id.* at 4 (noting FTC's "exhaustive examination of advertising, labeling, and other promotional practices in the cigarette industry").



**CONCLUSION**

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

H. BARTOW FARR, III \*  
 RICHARD G. TARANTO  
 KLEIN, FARR, SMITH  
 & TARANTO  
 2550 M Street, N.W.  
 Washington, DC 20037  
 (202) 775-0184

*Attorneys for Respondents*

\* Counsel of Record

*Of Counsel:*

MUDGE, ROSE, GUTHRIE,  
 ALEXANDER & FERDON  
 180 Maiden Lane  
 New York, NY 10038

ARNOLD & PORTER  
 1200 New Hampshire Ave., N.W.  
 Washington, DC 20036

SHOOK, HARDY & BACON  
 One Kansas City Place  
 1200 Main Street  
 Kansas City, MO 64105

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October Term, 1991

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THOMAS CIPOLLONE, individually and as Executor  
of the Estate of Rose D. Cipollone,

*Petitioner,*

- v. -

LIGGETT GROUP, INC., a Delaware Corporation; PHILIP  
MORRIS INCORPORATED, a Virginia Corporation; and  
LOEW'S THEATRES, INC., a New York Corporation,

*Respondents.*

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On Writ Of Certiorari To The United States Court  
Of Appeals For The Third Circuit

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REPLY BRIEF OF PETITIONER

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MARC Z. EDELL  
*Counsel of Record*

BUDD LARNER

GROSS ROSENBAUM

GREENBERG & SADE, P.C.

*Attorneys for Petitioner*

150 John F. Kennedy Parkway

CN 1000

Short Hills, New Jersey 07078

(201) 379-4800

ALAN M. DARNELL

*Of Counsel*

WILENTZ, GOLDMAN

& SPITZER, P.C.

*Attorneys for Petitioner*

90 Woodbridge

Center Drive

P.O. Box 10

Woodbridge,

New Jersey 07095-9811

(908) 636-8000

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## INTRODUCTION

A reading of the Labeling Act alone or in conjunction with its legislative history makes it plain that Congress did not intend to preempt common law tort claims. Arguing to the contrary, defendants assert the unlikely proposition that without a word, Congress in 1965 eliminated all means of redress for those injured by cigarette manufacturers' tortious conduct. To support this perspective, they disregard fundamental aspects of the analytical framework this Court employs in its preemption jurisprudence.

First, they exclaim: "Petitioner's claims are barred under any theory of preemption - express or implied, field or conflict." Rspt. Br. 8. But because their argument fails scrutiny under any theory of preemption, they collapse the distinct tests into one repetitive refrain. This gestalt approach blurs the distinction between express and implied preemption and ignores the "plain statement" rule this Court recently endorsed in *Gregory v. Ashcroft*, \_\_\_ U.S. \_\_\_, 111 S. Ct. 2395 (1991).<sup>1</sup>

Second, they reverse the presumption against preemption by shifting the burden to plaintiff to prove that Congress specifically intended to preserve these state common law tort actions. Rspt. Br. 25. Defendants have the test backwards. It is not our burden to convince this Court that the Act affirmatively allows state common law tort actions. Instead, it is their burden to demonstrate that Congress unquestionably intended to do away with them. This they cannot do.

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<sup>1</sup> This decision is conspicuously absent from defendants' and their amici's briefs.

Further, defendants' preemption argument is based on several erroneous assumptions. First, they assert that a jury would declare the federally-mandated warning to be inadequate and dictate the additional warning language that must be included on cigarette packages and in advertising. To support this argument they mischaracterize the form and effect a jury's verdict would have in this case. Next, they fail to acknowledge that the Act does not constrain them from fulfilling their common law duty to warn by a variety of means other than by adding additional warning statements to cigarette packages and advertising. They also fail to recognize that a jury could easily find no fault with the federally-mandated warning yet conclude for other reasons (including defendants' concerted efforts to undermine the warning) that they failed to warn their consumers adequately of the health hazards of smoking. Finally, and perhaps most importantly, they disregard Congress' awareness of these common law tort suits and its acceptance of any possible tension that might arise between them and the Labeling Act.

In the end, defendants' argument is tied neither to the language nor to the history of the Act. Rather, it is an appeal to this Court to second-guess Congress' judgment in declining to write preemption of state common law into the Act. According to this plea, the Labeling Act must include the destruction of these claims if the statute is to make good sense. However, the wisdom of Congress is not at issue; at issue is whether Congress deliberately eliminated these common law tort claims.

# I. THE LABELING ACT DID NOT EXPRESSLY PREEMPT STATE COMMON LAW TORT SUITS

## A. Plain Statement Analysis

Any argument that the Labeling Act on its face expressly preempts state law damage actions is indefensible in light of the "plain statement" rule recently adopted by this Court in *Gregory v. Ashcroft*, \_\_\_ U.S. \_\_\_, 111 S. Ct. 2395 (1991), which assists in focusing the express preemption inquiry. The rule mandates that "it must be plain to anyone reading the Act" that Congress expressly displaced state law. *Id.* at 2404. This requirement of a clear statement of intent ensures that "[i]n traditionally sensitive areas, such as legislation affecting the federal balance . . . the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* at 2401 (citations omitted).<sup>2</sup>

To find express preemption here, it must be plain to anyone reading the Act that Congress "faced" the issue of the states' traditional right to afford a means of compensation to their citizens and decided to do away with it. A

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<sup>2</sup> This rule acknowledges the basic structure of our government under which states retain sovereign powers that Congress will disturb only if necessary to accomplish its goals. *Id.* It is not limited to federal intrusion into the state's power to control its internal structure. Rather, it embodies principles of federalism applicable to all areas of traditional state control. Historically, states have provided a means of redress through common law tort systems to those injured by the irresponsible or socially unacceptable conduct of others. This Court is particularly solicitous of such traditional areas of state concern, and has been particularly reluctant to find an intent to alter those obligations in the absence of the clearest statement to the contrary.



review of the entire statute fails to reveal one word about state common law tort actions, let alone a clear unmistakable statement to do away with them.<sup>3</sup> Without exception, every one of the over seventy judges who has examined the Act, including those who found conflict preemption, concluded that Congress did not expressly eliminate these common law tort claims.<sup>4</sup> Even if one were to assume all these jurists are wrong, and it is uncertain whether Congress expressly displaced state tort law, we are left with ambiguity.<sup>5</sup> "In the face of such ambiguity, . . . [this Court] will not attribute to Congress an intent to intrude on state governmental functions," and express preemption will not be read into the statute. *Gregory*, 111 S. Ct. at 2406.

The plain language of the Act reveals that Congress was only concerned with affirmative rulemaking that would:

<sup>3</sup> See Pet. Br. 18-25; ACS Br. 16-19; Nat'l League Br. 6-10.

<sup>4</sup> Typical of these rulings was the Court of Appeals' below: "In applying these [preemption] principles to the statutory scheme at issue here, we first express our agreement with the district court's conclusion that section 1334 does not provide for express preemption of the Cipollones' state common law claims." Pet. App. 102a. See Pet. Br. 14 n.16; *Kotler v. American Tobacco Co.*, 926 F.2d 1217 (1st Cir. 1990); *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230 (6th Cir. 1988); *Baker v. Liggett Group, Inc.*, 132 F.R.D. 123 (Mass. 1990); *Herlihy v. R.J. Reynolds Tobacco Co.*, No. 85-3888-MA, 1988 WL 73434 (D. Mass. June 27, 1988); *Gianitsis v. American Brands*, 685 F. Supp. 853 (D. N.H. 1988); *Gilboy v. American Tobacco Co.*, No. 90-C-2686, 1991 WL 110887 (La. June 21, 1991).

<sup>5</sup> The reams of pages and many authorities cited on both sides debating the definition of "requirement" may alone be proof that, at best, the Act's preemption language is ambiguous.

- (1) require additional specific warning statements *on* cigarette packages;<sup>6</sup> and
- (2) require any specific warning statements *in* cigarette advertising.<sup>7</sup>

Thus, Congress excised a very narrow slice of traditional state police power – the power to dictate specific language relating to smoking and health on cigarette packages sold in the state and in cigarette advertising appearing in the state. The Act's Declaration of Policy in Section 2 confirms the problem Congress was concerned with was "diverse, nonuniform and confusing labeling and advertising *regulations*" and not the broader application of common law tort principles (emphasis added).<sup>8</sup>

Recognizing that it is impossible to read the preemptive reach of the original language of Section 5(b) to

<sup>6</sup> Section 5. (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.

Pub. L. No. 89-92, 79 Stat. 282, codified as amended at 15 U.S.C. § 1334.

<sup>7</sup> Section 5. . . . (b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

*Id.*

<sup>8</sup> Pub. L. No. 89-92, 79 Stat. 282, codified at 15 U.S.C. § 1331. See Pet. Br. 2 for reprint of this section. Apparently realizing that Congress' use of the word "regulations" in this Declaration of Policy undermines their preemption argument, defendants drop the word from their continual quotation of Section 2's "diverse, nonuniform and confusing" language. In lieu of "regulations," they substitute the words "regulation," "marketing conditions," or "obligations." Rspt. Br. 10, 36.

include common law tort claims, defendants ignore it and rely solely on the seemingly broader reach of the 1969 amendment.<sup>9</sup> Amended Section 5(b) preempted affirmative rulemaking that would result in "requirement[s] or prohibition[s] based on smoking and health" with respect to the "advertising or promotion" of cigarettes.<sup>10</sup> It did not signal an intent by Congress to expand the preemption section of the Act to include common law tort claims.<sup>11</sup> Rather, it was the result of Congress' desire to clarify that "[t]his preemption [provision] is intended to include not only action by State statute but by all other administrative actions or local ordinances or regulations by any political subdivision of any State." Conf. Rep. No. 897, 91st Cong., 2d Sess. 12, *reprinted in* 1970 U.S. Code Cong. & Admin. News 2676, 2677.<sup>12</sup>

Because defendants cannot disprove what is self-evident – that Congress did not expressly preempt these

<sup>9</sup> See, e.g., Rspt. Br. 30-31 (quoting only "no requirement or prohibition" language from advertising provision 5(b) in discussion of failure to warn claim); see also *id.* at 18, 24, 25, 40.

<sup>10</sup> Pub. L. No. 91-222, 84 Stat. 87, codified at 15 U.S.C. § 1334(b).

<sup>11</sup> The reasons for the amendment were wholly unrelated to common law tort actions. Congress amended Section 5(b) in order to prevent intrusions planned by the FCC, the FTC, and states to regulate or ban cigarette advertising, and because of heated debate concerning whether the 1965 Act's language actually prohibited a ban on advertising. See Nat'l League Br. 17-19.

<sup>12</sup> The language so reflects: Section 5(b) prohibits any "requirement or prohibition *based on* smoking and health." (Emphasis added). It leaves untouched personal injury actions *based on* generic common law duties to present information truthfully and to refrain from fraudulent activity.

suits in 1965 – they must establish that Congress abruptly changed course in 1969 in amending Section 5(b), something they utterly fail to do. In fact, they effectively concede that Congress did not expand the scope of the Act in the 1969 amendment. See Rspt. Br. 23 n.28.

Defendants' express preemption argument is based on their assertion that their common law duty to warn requires them to include additional warning language on cigarette packages and in advertising, to the exclusion of all other conduct. This is plainly not so. Defendants' duty may be fulfilled in myriad ways. Should they wish to furnish their consumers with complete and accurate information of the health hazards of smoking, they could, for example, employ public health announcements in television and print media, advertorials, or educational materials such as pamphlets, none of which implicates the warning label on cigarette packages or in cigarette advertising. See Six Former Surgeons General Br. 10-15.

#### **B. Further Evidence Confirms Congress Did Not Intend to Preempt State Common Law Tort Actions**

Beyond the plain language of the Act, a multitude of other indicators confirm that Congress never intended to eliminate the states' ability to afford their citizens a means of redress for the tortious conduct of the cigarette manufacturers. First, the Act's legislative history reveals Congress knew of these tort actions and took no steps to do away with them. See Pet. Br. 32-36. Although defendants contend that references in the legislative history to these suits are few, and appear only in hearings and floor debates, mention of common law suits was actually relatively frequent. Nat'l League Br. 19, n.12. In any event, the claims were not a major source of dispute simply because Congress never considered preempting them

and no one (including the cigarette companies) believed otherwise.<sup>13</sup>

Second, even without these clear references in the hearings and debates reflecting Congress' awareness and tolerance of these common law tort actions, it is a well-established presumption that when Congress acts, it is aware of the current state of the law.<sup>14</sup> It is fanciful to suggest that Congress was unaware of the general common law tort principle that a manufacturer owes a duty to its customers to inform them adequately of the health hazards of its products. Restatement (Second) of Torts § 388. Further, at the time Congress was considering the original Labeling Act, there had already been a number of

<sup>13</sup> Defendants attempt to distance themselves from their own witnesses by pleading that Joseph F. Cullman III's testimony that these suits would be unaffected by the Act must be discounted because he was not a lawyer. Rspt. Br. 43 n.50. See 1969 Hearings 597-600. Not only was he the CEO and Chairman of the Board of Philip Morris and Chairman of the Board of The Tobacco Institute (the industry's trade association), he was also designated as the industry's spokesperson to Congress on all aspects of the bill, including the issue of preemption. At no time during his testimony did he request preemption of these suits on the cigarette industry's behalf. Pet. Br. 30, n.33.

<sup>14</sup> *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 108 S. Ct. 1704, 1711-12 (1988). It should also be noted that before the Court of Appeals' decision in this case, other federally-mandated warning requirements had always been considered the floor, not the ceiling, of a manufacturer's common law duty to convey to its consumers the nature and extent of the health hazards of its products. E.g., Restatement (Second) of Torts § 288C; *Feldman v. Lederle Laboratories*, No. A-93, 1991 WL 135649 (N.J. July 24, 1991) (FDA requirements do not preempt state common law failure to warn claims against pharmaceutical manufacturers). Until the Court of Appeals' ruling in this case, no product manufacturer was ever exempted from this common law duty common to all industries.

trials and reported decisions in cases brought by injured smokers against cigarette manufacturers. See Pet. Br. 32, n.39. These facts also lay to rest defendants' claim that because Congress could not anticipate every possible impediment to its scheme, it painted preemption with a broad brush.

Third, the absence of any compensatory provision for injured smokers in the Act is further evidence that Congress never intended to do away with these product liability claims. Undoubtedly, Congress could have eliminated all means of redress but "[i]t is difficult to believe that Congress would, *without comment*, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) (emphasis added). Further, because the Labeling Act contains no exclusive or alternative remedy provision, it lacks the kind of "special features warranting preemption" this Court found so persuasive for preemption under ERISA in *Ingersoll-Rand Co. v. McClendon*, \_\_\_ U.S. \_\_\_, 111 S. Ct. 478, 485 (1990), a case heavily relied on by defendants.<sup>15</sup>

Finally, Congress' willingness to permit defendants to say more about the health hazards of smoking evinces its intent to permit these suits to continue. A critical question left unanswered by defendants is why Congress permitted cigarette manufacturers to provide consumers with additional information concerning the health

<sup>15</sup> Defendants' amicus states: "the Labeling and Advertising Act does contain effective alternative remedies." PLAC Br. 3. Such a statement goes beyond disingenuous. The Act provides no compensatory remedy to injured smokers. It only provides for criminal penalties and injunctive proceedings for violations of the Act brought by the Attorney General. See 15 U.S.C. §§ 1335-36.



hazards of their products. It is absurd to presume Congress left the cigarette industry free to say more so it could embark on a scheme to neutralize or cast doubt on the federal health warning. More likely, Congress gave cigarette manufacturers the discretion to decide how and whether to provide additional information to their consumers regarding the health hazards of smoking because cigarette manufacturers are in the best position to determine how to allow consumers to make an informed decision about smoking – the very discretion all manufacturers must exercise reasonably to fulfill their common law duty to warn.<sup>16</sup>

### C. Defendants' View of Preemption Ascribes Absurd Designs to Congress

We concur with defendants' *amicus* that "courts should strive to avoid attributing absurd designs to Congress, particularly when the language of the statute and its legislative history provide little support for the proffered counterintuitive reading." PLAC Br. 5. Ironically, however, it is the cigarette industry's view of preemption that ascribes to Congress the following absurd views, goals and intent:

- Congress, without comment, eliminated all means of redress for those injured by a manufacturer's tortious conduct – an event unique in Congressional history.

<sup>16</sup> Cigarette manufacturers have exercised this freedom of choice in favor of the financial bottom line. They decided it was more profitable to approach the cigarette smoking and health issue, as they have, with the understanding that if they were held accountable they would build such costs into the price of the product and go on with business as usual.

- Congress, without comment, eliminated cigarette manufacturers' common law duty to warn.
- Congress, without comment, eliminated cigarette manufacturers' liability for their intentional misconduct, including false advertising, suppressing research results, and withholding new and important information on the health hazards of cigarette smoking.
- Congress permitted cigarette manufacturers to say more to their consumers regarding cigarette smoking and health, not to inform them but rather to neutralize the effect of Congress' warning.
- Congress was worried that if cigarette manufacturers provided additional information about the true nature and extent of the health hazards of cigarette smoking, the American public would learn too much, purchase fewer cigarettes and, consequently, the national economy would suffer.<sup>17</sup>

The most cynical critic would not attribute the above to Congress, especially in light of its goals in enacting the Act<sup>18</sup> and the fact that even the cigarette industry was not so bold as to ask for such broad preemption. Nevertheless, defendants expect this Court to impute these very designs to Congress.

<sup>17</sup> See *Banzhaf v. F.C.C.*, 405 F.2d 1082, 1089 (D.C. Cir. 1968), *cert. denied*, 364 U.S. 842 (1969) (construing Labeling Act):

Accordingly, if we are to adopt [cigarette manufacturers'] analysis, we must conclude that Congress legislated to curtail the potential flow of information lest the public learn too much about the hazards of smoking for the good of the tobacco industry and the economy. We are loathe to impute such a purpose to Congress absent a clear expression.

<sup>18</sup> See ACS Br. 6-13; Nat'l League Br. 12-22; Pet. Br. 27-32.

## II. STATE COMMON LAW TORT SUITS DO NOT CONFLICT WITH THE PURPOSES OF THE LABELING ACT

### A. A Favorable Jury Verdict Will Not Act as an Obstacle to the Accomplishment of the Labeling Act's Secondary Purpose - to Avoid "Diverse, Nonuniform, and Confusing Labeling and Advertising Regulations"

Defendants do not contend it is physically impossible to pay money damages resulting from these suits and comply with the labeling and advertising requirements of the Act, nor do they suggest it is physically impossible to provide additional information to their consumers regarding the health hazards of their products and comply with the requirements of the Act. The essence of their conflict argument, therefore, is that a jury verdict finding that (1) cigarette manufacturers failed to convey adequately to its consumers the health hazards of cigarettes or (2) cigarette manufacturers intentionally withheld information from or misled consumers, would act as an obstacle to the accomplishment of the Act's secondary purpose (to avoid nonuniform labeling and advertising regulations).<sup>19</sup>

Defendants confuse the conflict issue. They suggest such a verdict would permit six amateurs to second-guess Congress, and would result in regulations specifying additional language that must be included on cigarette packages and in advertising. However, this depiction

<sup>19</sup> As noted previously, Congress' primary purpose in enacting the Act was to inform the public of the hazards of cigarette smoking, a goal fully consistent with tort suits. See Pet. Br. 39-40; Nat'l League Br. 29, n.24.

of how a jury works, and what a jury says, is a transparent attempt to transform jurors into what they are not - legislators. Unlike the legislature, the jury does not decide the wording used on the labels. All a jury will decide is whether cigarette manufacturers, in light of all attendant circumstances, afforded their consumers a full and accurate appreciation of the hazards of their products. If not, the jury will return an adverse verdict and defendants must pay. The jury will not, however, dictate additional warning language for cigarette packages or advertising, nor will it prescribe the manner in which the cigarette manufacturers should or should not advertise their products.

The suggestion that one state, through a verdict, "might require certain information that another state [through another jury verdict] prohibits as misleading, unproven, or superfluous, thereby leaving cigarette manufacturers without any single warning label that can be used across the country" (PLAC Br. 28), typifies defendants' grave misunderstanding of how juries work. Their first mistake is failing to see that a jury verdict in state one will never say: "You are liable because you must say 'X' and you shall convey that message by means 'Y'," or "You should have said 'X' and you should have conveyed that message by means 'Y'." All the jury will say is: "You failed to warn adequately; therefore, you must pay money damages." Defendants' error is compounded by their suggestion that the jury in state two would see and evaluate the nonexistent directive of state one's jury and then make a specific finding that the language ordained by the first jury was "misleading, unproven, or superfluous." This portrayal denies the jury's mandate: to consider all the evidence, including defendants'

communications and conduct, as well as the federal warning label, and decide whether the cigarette manufacturers fulfilled their duty to warn their customers adequately about their products.<sup>20</sup>

Moreover, a jury finding that cigarette manufacturers failed to warn consumers adequately of the hazards of smoking would not necessarily mean that the jury found the federal warning to be lacking. It may very well be that had defendants not taken steps to neutralize or otherwise detract from the effectiveness of the health warnings, the warning standing alone would have adequately conveyed to the public the health hazards of cigarette smoking.<sup>21</sup>

Finally, if cigarette manufacturers decide to limit their exposure in the future because of adverse jury verdicts, Congress has left them free to do so.<sup>22</sup> Consistent

<sup>20</sup> See *Banzhaf*, 405 F.2d at 1090:

Congress may reasonably have concluded that a warning on each pack was adequate *warning*. It surely did not think the warnings were themselves adequate *information*. And we find no sufficiently persuasive evidence that Congress hoped to impede the flow of adequate information for fear that, if the public knew all the facts, too many of them would stop smoking. (emphasis in original).

<sup>21</sup> See e.g., *Salmon v. Parke, Davis and Co.* 520 F.2d 1359, 1362 (4th Cir. 1975) ("[O]verpromotion of the drug may erode the effectiveness of otherwise adequate warning.").

<sup>22</sup> See *supra* discussion at 7. Defendants could even petition Congress to change the language of the warning label. Apparently, they have never been reluctant to do so in the past

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with their past practice, however, they will probably do nothing. Aside from vague allusions as to what other manufacturers might do, defendants have never stated they would do anything in response to adverse verdicts other than build the expense into the price of their product. In fact, they have consistently stated these suits will have no material effect on their financial well-being. See Pet. Br. 42-43 & n.47.

#### **B. Congress Was Willing to Accept Any Tension that Might Arise from these Common Law Tort Claims**

In addition to Congress' awareness of these suits at the time it enacted the Labeling Act, a number of other factors reflect Congress' willingness to accept any tension that might arise from these lawsuits. Defendants contend it is "implausible" and "bizarre" to think Congress would have enacted legislation, crafted the precise language of the warning, and yet left intact cigarette manufacturers' state common law duties to their citizens. Rspt. Br. 40, 46. To the contrary, there is nothing implausible about it.

Perhaps the clearest evidence that such a proposition is perfectly plausible is found in the Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. § 4401. The Smokeless Act, which requires

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when it best served their interest. See, e.g., *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582, 589 (D.D.C. 1971) ("The passage of the Public Health Cigarette Smoking Act of 1969 marked a dramatic legislative *coup* for the tobacco industry.") (emphasis in original).



warning labels on smokeless tobacco products, employed as its blueprint the Cigarette Labeling Act. Although the Smokeless Act has no "Declaration of Policy" section, its legislative history reveals that Congress had the same two concerns it had when it enacted the Labeling Act: to educate the public of the dangers of smokeless tobacco; and to protect the national economy against conflicting labeling and advertising requirements. 132 Cong. Rec. H247 (daily ed. Feb. 3, 1986) (Statement by Rep. Waxman, co-sponsor of the bill).<sup>23</sup>

To facilitate its second purpose, Congress incorporated a preemption provision similar to the one in the Labeling Act: "No statement relating to the use of smokeless tobacco products and health . . . shall be required by any State or local statute or regulation to be included on any package or in any advertisement." 15 U.S.C. § 4406(b). Congress also included a savings clause in the Act: "Nothing in this Act shall relieve any person from liability at common law or under statutory law to any other person." 15 U.S.C. § 4406(c).<sup>24</sup>

<sup>23</sup> The Smokeless Tobacco Council endorsed the Act, reiterating the necessity of "avoid[ing] the myriad of problems attendant with warning labels promulgated by various state legislatures or federal or state agencies." *Id.* (letter by Michael Kerrigan, President, Smokeless Tobacco Council, to Rep. Waxman, Jan. 27, 1986).

<sup>24</sup> Defendants suggest that Congress would have incorporated a similar savings clause in 1965 had it intended to preserve these common law tort claims. This argument is woefully deficient. First, given the presumption against preemption, this Court must find evidence that Congress intended to preempt common law, not evidence that it meant to preserve it. Second, at the time it considered the Smokeless Act, Congress

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Thus, in the Smokeless Act, Congress did the "unthinkable" – it concluded that common law claims premised on inadequate warning and intentional misconduct can coexist with the labeling and advertising requirements of the Smokeless Act. There is no reason to believe common law tort claims cannot similarly coexist with the Labeling Act. Without exception, Congress has been willing to accept the tension between federal acts and common law tort actions where Congress has decided not to become involved in the compensation issue by providing (or simply not precluding) some alternative means of redress to the injured victim. *See, e.g., Silkwood*, 464 U.S. at 256.

In part, defendants' incredulity that Congress would have permitted these suits to go forward stems from their skewed perspective of the jury system. They fail to recognize that jurors have been entrusted with deciding questions far more sophisticated than the ones presented here to the satisfaction of Congress and this Court – jurors in *Silkwood* evaluated the safety of nuclear facilities.

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knew of the various lower court decisions erroneously construing the preemption section of the Labeling Act. Congress wanted to ensure that similar error was not made in interpreting the Smokeless Act, and so it stated in plain unmistakable terms in a savings clause that the preemption language of the Act was not intended to preempt state tort law suits. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change."); 2A C. Sands, Sutherland on Statutory Construction § 49.09 and cases cited therein (4th ed. 1973).

Certainly, jurors are at least as well equipped to decide whether defendants adequately conveyed to consumers the health hazards of smoking as how to run a nuclear facility safely. Jurors are average consumers. They are probably in the very best position to decide whether manufacturers met their common law duties to their customers.

### III. THE ACT DOES NOT PREEMPT PLAINTIFF'S INTENTIONAL TORT CLAIMS

Notably, defendants do not deny engaging in the intentional misconduct described in our initial brief. They nonetheless seek refuge for their tortious conduct in the same preemption argument offered on the duty to warn claim. Not only do the same deficiencies found in their duty to warn argument follow them here, but defendants also ignore the obvious differences between a claim based on what they failed to do and one based on their affirmative efforts to undermine Congress' goals.<sup>25</sup>

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<sup>25</sup> In a final effort to preempt petitioner's intentional tort claims, defendants assert that the power of the Federal Trade Commission to halt false advertising confirms the comprehensive nature of the federal scheme in that it provides an "alternative remedy" for defendants' tortious conduct. This argument fails on all accounts.

First, the FTC has never had any power to afford compensation to those injured by false and misleading advertising. Thus, an FTC cease and desist order would leave injured smokers with no damages remedy. Second, the Labeling Act gave the FTC no new authority. In fact, Congress preempted some of the FTC's traditional powers in the original Act and then reinstated some through the 1969 amendment. Moreover, the Act never directed the FTC to do anything other than report to Congress on the effectiveness of the Labeling Act. It provided the FTC with no new regulatory control over the warnings, their effectiveness, or cigarette advertising.

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Most significantly, defendants fail to acknowledge that most of their activities that serve as the basis for Mrs. Cipollone's intentional wrongdoing claims are, by their own admission, activities and communications outside the scope of the Act. For example, the industry's scheme to neutralize the effectiveness of the federally-mandated health warning was accomplished through public relations efforts and public statements of their trade associations, such as the Tobacco Industry Research Council, The Tobacco Institute, and the Council for Tobacco Research. These communications took various forms, all of which defendants considered to be non-product advertising or promotion, as evidenced by the fact that none of them carries the federally-mandated warning. See e.g., J.A. 42, 72, 76, Pet. App. 227a. In fact, they have argued staunchly against any interference with such speech.<sup>26</sup> In addition, defendants have issued press releases both directly and through experts, have had stories ghost-written for them questioning the relationship between cigarette smoking and health, and have taken out advertorials contesting the relationship between smoking and health (J.A. 42, 72), all under the guise of "free noncommercial speech," or at least speech outside the purview of the Act.

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(Continued from previous page)

Third, no court has held that an FTC finding that a particular communication is false and misleading preempts state law tort claims based on the same communications. Indeed, even in the warranty area, where the FTC's power has been statutorily augmented, no preemption has been found. See, e.g., *Motor Vehicle Manufacturers Ass'n v. Abrams*, 899 F.2d 1315 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1122 (1991) (Solicitor General supporting no preemption).

<sup>26</sup> *In the Matter of R. J. Reynolds Tobacco Co.*, No. 9206 (FTC Aug. 4, 1986).

The cigarette industry cannot have it both ways. It cannot speak in a form claimed to be unconstrained by the Act yet assert the Act as a preemptive shield for the very same conduct.

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### CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

MARC Z. EDELL

Counsel of Record

BUDD LARNER GROSS ROSENBAUM

GREENBERG & SADE, P.C.

*Attorneys for Petitioner*

150 John F. Kennedy Parkway

CN 1000

Short Hills, New Jersey

07078-0999

(201) 379-4800

On the Brief

MARC Z. EDELL

August 12, 1991



In The  
**Supreme Court of the United States**  
October Term, 1990

THOMAS CIPOLLONE, individually and as Executor  
of the Estate of Rose D. Cipollone,

Petitioner,

v.

LIGGETT GROUP, INC., a Delaware Corporation;  
PHILIP MORRIS INCORPORATED, a Virginia  
Corporation; and LOEW'S THEATRES, INC.,  
a New York Corporation,

Respondents.

On Writ of Certiorari to the  
United States Court of Appeals  
for the Third Circuit

Brief *Amicus Curiae* of the American Cancer Society,  
American College of Cardiology, American Heart  
Association, American Lung Association, American  
Public Health Association, and Public Citizen  
In Support of Petitioner

Alan B. Morrison  
(Counsel of Record)  
David C. Vladeck  
Cornish F. Hitchcock

Public Citizen Litigation Group  
2000 P Street, N.W.  
Suite 700  
Washington, D.C. 20036  
(202) 833-3000

Attorneys for *Amici*

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No. 90-1038

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In The  
**Supreme Court of the United States**  
October Term, 1990

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THOMAS CIPOLLONE, individually and as Executor  
of the Estate of Rose D. Cipollone,

Petitioner,

v.

LIGGETT GROUP, INC., a Delaware Corporation;  
PHILIP MORRIS INCORPORATED, a Virginia  
Corporation; and LOEW'S THEATRES, INC.,  
a New York Corporation,

Respondents.

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Brief *Amicus Curiae* of the American Cancer Society,  
American College of Cardiology, American Heart  
Association, American Lung Association, American  
Public Health Association, and Public Citizen  
In Support of Petitioner

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**INTERESTS OF AMICI CURIAE**

The American Cancer Society, American College of Cardiology, American Heart Association, American Lung Association, American Public Health Association, and Public Citizen are non-profit organizations that work to reduce the deadly toll that cigarettes have taken on the American people. Their interests are more fully spelled out in the Addendum to this brief ("Add." 1-2). This brief is filed with the written consent of the parties.

## STATEMENT OF THE CASE

This is a product liability action involving claims for personal injury and wrongful death that were caused by long term use of respondents' cigarettes. The issue before the Court is what preemptive effect, if any, the Federal Cigarette Labeling and Advertising Act of 1965, as amended (the "Labeling Act"), 15 U.S.C. §1331, has on petitioner's claims that respondents failed to warn petitioner's decedent of the dangers of smoking, that they engaged in false and misleading advertising concerning the effects of smoking on human health, and that they intentionally embarked on a campaign to negate the effects of the required warning label on cigarette packages and in cigarette advertising.

Early in the litigation, respondents raised the preemptive effect of the Labeling Act as a defense, arguing that Congress's decision to require warning labels precludes the states from allowing a plaintiff in a tort case against a cigarette manufacturer to base a claim on a failure to warn of the dangers of smoking or on false and misleading advertising. In essence, respondents argued that, regardless of what they said or failed to say after 1965 about the connection between their cigarettes and the health of those who smoked them, they were entitled to absolute immunity for that aspect of their conduct. The district court ruled against respondents, but certified the preemption question for interlocutory appeal to the Third Circuit, which reversed. Although the court of appeals found neither express preemption nor that Congress intended to occupy the field related to cigarettes and health, it nonetheless concluded, based largely on the general statements of purposes in the introduction to the Labeling Act, that Congress impliedly preempted not only all failure to warn claims, but also those based on false and misleading advertising. A petition for writ of certiorari from that decision was denied, and the case returned to the district court for discovery and eventual trial.

Of the many rulings made by the lower courts thereafter, the only ones of significance relate to the effect of the prior preemption ruling on the admissibility of evidence concerning what respondents did after the effective date of the Labeling Act (January 1, 1966) and what petitioner's decedent learned after

that date. As to both of these issues, the court of appeals ruled that no post-1965 evidence could be admitted, for or against either side, because to do so would evade its prior preemption ruling. As even respondents admit, the Labeling Act has no effect prior to 1966, and so the evidence which shows what respondents did and did not know about the hazards of smoking prior to 1966 is admissible. However, everything that Mrs. Cipollone learned or that respondents did or failed to do after January 1, 1966, must be excluded from the jury because, according to the court of appeals, that is what Congress intended but left unsaid in the Labeling Act.

## SUMMARY OF ARGUMENT

The Labeling Act contains a specific preemption provision, 15 U.S.C. § 1334(b), that the Third Circuit, like every other court to consider the issue, correctly found did not apply. While the language in section 1334(b) on which respondents rely -- that the states may not impose any "requirement or prohibition" with respect to the advertising or promotion of cigarettes -- is ambiguous, the legislative history of the Labeling Act makes it clear that this phrase was never intended to include tort claims such as those that petitioner has made here. The absence of any congressional intent to preempt these claims is established by three aspects of that history.

First, there is nothing to suggest that Congress or even the cigarette manufacturers were interested in preempting state common law tort remedies. Indeed, all of the discussion of preemption focused on what the Federal Trade Commission and the states were doing by statutes or regulations to impose affirmative warning requirements on both cigarette packages and in cigarette advertising. There is a vast difference between the imposition of specific, mandatory disclosure requirements, with the almost inevitable conflict among the various entities imposing them, and the common law claims at issue here, which are based on both respondents' failure to warn the public about the dangers of their products and their own affirmative statements which misled Mrs. Cipollone into believing that smoking was safe. The difference is between the means of achieving disclosure, which are forbidden by the Act if they require that particular statements be



made, and the ends of full and honest disclosure, which are not, since respondents were free to comply with New Jersey law and federal law by supplementing the information in the existing warnings about the dangers from smoking by whatever means they may choose.

Second, the preemption provisions in the 1965 Act were narrowly construed by the D.C. Circuit in *Banzhaf v. FCC*, 405 F.2d 1082 (1968), *cert. denied*, 396 U.S. 825 (1969), to apply only to the imposition of affirmative requirements, which plainly do not include state common law tort remedies. Despite this, when Congress modified this provision slightly in 1970, it never expressed any intention to broaden the scope of preemption, let alone to sweep state common law tort actions within its reach.

Third, petitioner's claims are based in part on what respondents chose to say in their own advertisements and in part on what they failed to say in them. Yet, until late 1984, after Mrs. Cipollone had died, Congress itself, as opposed to the Federal Trade Commission, imposed no requirement that cigarette advertisements contain a health warning, nor has it provided an alternative damages remedy to replace the state law claims that respondents assert have been preempted by the Act. Under these circumstances it would be startling indeed if Congress intended to entirely deny the states their ability to assure that their citizens are adequately informed about the health hazards from smoking.

After properly rejecting express preemption and finding no intent to occupy the field, the Third Circuit nonetheless found implied preemption and in doing so it committed two errors. First, as this Court's decision in *California Federal Savings & Loan Ass'n. v. Guerra*, 479 U.S. 272 (1987), makes clear, when Congress has directly expressed its preemption intentions in the language of a statute, the courts may not go beyond that language to find a different preemption balance. Thus, once the Third Circuit concluded that the phrase "requirement or prohibition" did not include state tort law claims, it erred by looking for implied preemption in other parts of the Act. Second, it improperly relied on a general statement of a subsidiary purpose to find implied preemption, and by doing so, it seriously undermined the princi-

pal purpose of the Act -- to increase the flow of information to the public about the dangers of smoking.

The industry's preemption defense is even more untenable when directed at petitioner's claim that respondents affirmatively engaged in false and misleading advertising about the dangers from smoking and intentionally sought to negate the effect of the warning labels in an effort to persuade the public that cigarettes were not harmful. While petitioner's failure to warn claim is based on what respondents did not say, but should have said about their cigarettes, the deceptive advertising tort is based on what they deliberately chose to say in order to induce the public to smoke. There is not a word in the Labeling Act or a shred of legislative history that suggests that Congress intended to relieve the tobacco industry of the consequences of its intentionally misleading claims that smoking was not harmful.

## ARGUMENT

### THE DECISION OF THE COURT OF APPEALS SHOULD BE REVERSED.

The question presented is whether the general obligations that are imposed under state tort law, which require all manufacturers to take reasonable steps to ensure that consumers receive adequate and non-deceptive information about the dangers of their products, are rendered unenforceable for cigarettes by the Federal Cigarette Labeling and Advertising Act of 1965, 15 U.S.C. § 1331 *et seq.*, as amended in 1970 and 1984. In *amici's* view the preemption issue in this case turns on what Congress did in those three statutes, and, accordingly, this brief focuses on the portions of those statutes and their history which bear on the preemption issue, leaving to the briefs of petitioner and others the more general discussion of the law of preemption. To assist the Court, *amici* have included as an addendum to this brief the original Act, Pub. L. 89-92, 79 Stat. 282 (Add. 3-6), and both the 1970 and 1984 amendments to it: the Public Health Cigarette Smoking Act of 1969, Pub. L. 91-222, 84 Stat. 87 (Add. 7-11), and the Comprehensive Smoking Education Act of 1984, Pub. L. 98-

474, 98 Stat. 2200 (Add. 11-18), respectively.<sup>1</sup>

To answer the question of preemption, the Court must look at the statutory language, consider the concerns of Congress that led to its decision to preempt, and examine with care what Congress actually did. As this brief will show, nothing that Congress did or said demonstrates an intent to prevent injured consumers from utilizing their state tort laws to collect damages from cigarette manufacturers who do not provide them with adequate and accurate information concerning the harms from smoking.

#### A. What The Act And Its Amendments Provide.

In 1965, Congress passed the Labeling Act, which both mandated a federal warning on cigarette packages and allocated between the federal and state governments certain responsibilities and powers regarding warning labels on cigarette packages and advertisements. Its enactment was the result of three forces that are relevant to the preemption issue. First, following the Surgeon General's 1964 Report, there was a strong movement to require the tobacco companies to disclose the health dangers from smoking. Second, the Federal Trade Commission ("FTC") concluded that the absence of detailed health information in cigarette advertisements rendered them false and/or deceptive within the meaning of section 5 of the FTC Act, 15 U.S.C. § 45. *See* 29 Fed. Reg. 8324 (1964). Third, a number of states were considering requiring specific warning labels on cigarette packages and imposing disclosure requirements on cigarette advertising. *See* Hearings Before the Senate Comm. on Commerce on S. 559 and S. 547, 89th Cong., 1st Sess. 39-40 (March 22, 1965); 111 Cong. Rec. 13901 (col. 3) (1965) (remarks of Sen. Moss).

Although the Declaration of Policy in the 1965 Act proclaims an intent "to establish a comprehensive Federal program," section 2 (Add. 3), Congress in fact did far less. The only mandatory duty that it imposed was to require the following label on every package of cigarettes: "Caution: Cigarette Smoking May Be

<sup>1</sup>References in this brief will generally be to the Acts of 1965, 1970, or 1984 and will include references to the U.S. Code section where applicable.

Hazardous to Your Health." Section 4, 15 U.S.C. § 1333 (Add. 4). It did not require nor did it authorize any federal agency to require any disclosures on cigarette advertising. Thus, cigarette advertising, as distinct from cigarette packaging, was left unregulated by the federal government under the 1965 Act. Moreover, since 1965 states and local communities have enacted a wide spectrum of laws regulating tobacco products. These include taxes, minimum age of sale requirements, free sampling restrictions, limitations on smoking in public places, and government sponsored educational programs. Moreover, none of them has sued to enjoin those laws on the theory that Congress intended to preempt them under the Act. *But see* note 10 *infra* at 26.

The narrowness of the federal program is vital to an understanding of the other major aspect of the 1965 Act -- its two-pronged preemption provision which, with minor changes described *infra* at 10-11, remains in effect today. The first prong, contained in subsection 5(a), 15 U.S.C. § 1334(a), provides that "No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package" (Add. 4). That prong is limited to cigarette packages, and does not apply to advertisements or other promotional materials. In addition, it leaves cigarette makers free to make additional disclosures if they so choose; they simply could not be required, by any state or federal agency, to put an additional or different warning on their packages. This provision answered the cigarette companies' principal objection to warning labels: the fear of having different labels mandated by different states on the same package. *See* H.R. Rep. No. 449, 89th Cong., 1st Sess. 4, 9 (1965) ("1965 House Report"), *reprinted in* 1965 U.S. Code Cong. and Admin. News 2350; S. Rep. No. 195, 89th Cong., 1st Sess. 4 (1965) ("1965 Senate Report").

The second preemption provision was subsection 5(b), 15 U.S.C. § 1334(b), which in 1965 provided:

No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.



(Add. 4-5). This subsection applied only to advertising, and it only prohibited efforts to require that a statement, presumably dictated by a federal, state, or local agency, be included in advertisements. Indeed, that is all that the tobacco companies sought. As one spokesman urged, the preemption provision should be amended to "make clear that no Federal, State, or local authority may impose a warning in advertising for cigarettes packaged in conformity with the labeling provision of the act." Statement of Bowman Gray, Chairman of the Board, R.J. Reynolds Tobacco Co., Cigarette Labeling and Advertising, Hearings Before House Comm. on Interstate and Foreign Commerce, 89th Cong., 1st Sess. 281 (April 6, 1965) ("1965 House Hearings"); *id.* at 292. Nothing else was preempted in the 1965 Act, and no mention was made of preempting state tort law remedies in either the hearings, the committee reports, or the floor debates. Thus, under the 1965 Act, it seems clear that petitioner's claims would *not* have been expressly preempted since nothing in New Jersey law dictates that a manufacturer is "required" to include a "statement relating to smoking and health" on its packages or in its advertising, which is all that was preempted by subsections 5(a) and (b) of the 1965 Act.

The third part of the 1965 preemption provision, subsection 5(c) (Add. 5), is no longer part of the Act. It limited the power of the FTC to issue trade rules or "to require an affirmative statement in any cigarette advertisement," but under section 10 (Add. 6), even that limitation expired on July 1, 1969. Moreover, nothing in section 5 or elsewhere prevented the FTC from taking action to stop individual companies from engaging in false advertising, just as it had always done. *See* 1965 House Report at 8 ("in other respects the authority of the Federal Trade Commission with respect to false or misleading advertisements of cigarettes is stated to be unaffected"). The FTC, like the states, was simply forbidden from requiring affirmative statements in cigarette advertising about the connection between smoking and health, either through trade rules or otherwise.

Meanwhile, in 1966 the Federal Communications Commission ("FCC") was petitioned to invoke its fairness doctrine to require radio and television stations that carried cigarette advertisements to present public service announcements describing the

adverse health effects of tobacco use. The FCC largely agreed, and the tobacco companies challenged the FCC's ruling, arguing, in part, that the preemption provisions of section 1334 forbade the FCC from imposing such a requirement. In *Banzhaf v. FCC*, 405 F.2d 1082 (1968), *cert. denied*, 396 U.S. 842 (1969), the D.C. Circuit rejected that argument. The court's reasoning on this point, rather than its specific holding, is of great importance because it set the stage for what happened -- or more precisely what did not happen -- when Congress reconsidered the preemption issue in 1969:

Since the Commission's ruling does not require the inclusion of any "statement . . . in the advertising of any cigarettes" but rather directs stations which advertise cigarettes to present "the other side" each week, it does not violate the letter of the Act.

\* \* \*

This *relatively narrow reading* of the Act is not in conflict with its declared objective of protecting commerce and the national economy against "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." Congress patently did not want cigarette manufacturers harassed by *conflicting affirmative requirements* with respect to the content of their advertising.

*Id.* at 1088, 1090 (emphasis added, footnote omitted). Thus, as construed by the D.C. Circuit, section 5(b) of the 1965 Act preempted only affirmative requirements. The court also noted:

if we are to adopt [the cigarette manufacturers'] analysis, we must conclude that Congress legislated to curtail the potential flow of information lest the public learn too much about the hazards of smoking for the good of the tobacco industry and the economy. We are loathe to impute such a purpose to Congress absent a clear expression.

\* \* \*

Nothing in the Act indicates that Congress had any intent at all with respect to other types of regulation [beside



affirmative requirements] by other agencies -- much less that it specifically meant to foreclose all such regulation. If it meant to do anything so dramatic, it might reasonably be expected to have said so directly -- especially where it was careful to include a section entitled "Preemption" specifically forbidding designated types of regulatory action.

*Id.* at 1089 (footnotes omitted). This was the only pre-amendment judicial interpretation of the 1965 preemption provision, and it concluded that Congress did nothing more than eliminate the possibility of specifically mandated affirmative requirements, and that Congress did not intend to deny federal agencies -- and by implication, the states -- the power to impose other disclosure obligations on cigarette manufacturers. It was with this judicial construction as background that Congress revised the Act in 1969.

Shortly before July 1, 1969, when the ban on the FTC's right to impose affirmative advertising requirements for cigarettes was to expire, the agency proposed a warning for all cigarette advertising. 34 Fed. Reg. 7917 (1969). Congress responded with Public Law 91-222, which was signed on April 1, 1970. The basic framework of the 1965 Act was retained, but some changes were made. First, although the warning label for cigarette packages was somewhat strengthened, *see* section 4 of the 1970 Act (Add. 8), Congress still did not either require a warning for cigarette advertisements or establish an affirmative educational program.

Second, in section 7(a), Congress temporarily extended the ban on the FTC's authority to impose a health warning for cigarette advertising, but then left the agency free to require specific warnings in cigarette advertisements, so long as it gave Congress six months advance notice (Add. 9). The 1970 Act did not address the problem of misleading cigarette advertising, nor did it even require the FTC or any other agency to do so. Sections 7(b) and (c) (Add. 9) reiterated Congress' earlier determination in section 5(c) that the Act did not alter the FTC's power to stop false and misleading cigarette advertising (Add. 5). However, Congress did amend the preemption provision in section 1334(b) so that it no longer applied to federal agencies, but only to the states. *See* section 5(b) of 1970 Act (Add. 8-9). Whereas under

the 1965 version of section 1334(b), the FTC could not have required any "statement relating to smoking and health" in cigarette advertisements (not even the federally-mandated label used on cigarette packages), this amendment freed it to do so after July 1, 1971. In fact, when the FTC finally acted, with the industry's consent, it did nothing more than require that all advertisements contain the 1970 package warning label. *See In the Matter of Lorillard*, 80 F.T.C. 455 (1972).

Third, Congress prohibited all advertising of cigarettes "on any medium of electronic communications" after January 1, 1971. Section 6, 15 U.S.C. § 1335 (Add. 9). Once again, the cigarette companies went along, doubtless believing that they were better off with no television and radio advertising than they would be in the post-*Banzhaf* era in which opposing viewpoints would regularly be broadcast to the American public.

Fourth, there were other minor changes in the preemption provision in section 1334(b). In addition to eliminating its applicability to federal agencies, Congress extended it slightly so that it included not only "advertising," but "advertising or promotion" of cigarettes. Moreover, because of the other changes described above, section 5(b) was structured differently from its predecessor by banning any "requirement or prohibition based on smoking and health . . . imposed under state law. . . ." There is no indication, however, that the Senate, which made this change, intended the "or prohibition" phrase to have a broad meaning, or to do any more than prevent a state from doing indirectly by a prohibition, that which it could not do directly by a requirement. *See* S. Rep. No. 91-566, 91st Cong., 1st Sess. 12-13 (1969), *reprinted in* 1970 U.S. Code, Cong. & Admin. News 2652 ("1969 Senate Report"). As a result, the 1970 version, which remains intact today as section 1334(b), reads as follows:

(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

There are two other aspects of the 1970 changes that are worthy of note. First, nothing in the legislative history suggests that revised section 1334(b) was to be significantly different from its predecessor. The 1969 Senate Report summarized the preemption provision as one which "[p]rohibits health-related regulation or prohibition of cigarette advertising by any State or local authority." *Id.* at 1. The three-paragraph discussion of preemption neither mentioned state tort laws, nor suggested any dramatic change. Instead, it stated that the preemption language was included "to avoid the chaos created by a multiplicity of conflicting regulations," *id.* at 12, a concern that is wholly irrelevant to a preemption of petitioner's claims here. Nor did the Conference Report suggest any expansion of the prior preemption provision. H.R. Rep. No. 91-987, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code, Cong. and Admin. News 2676 ("1970 Conf. Report").

Second, this Court declined to review *Banzhaf* on October 13, 1969, when the 1970 Act was pending before the Senate Commerce Committee. Despite the narrow reading that the D.C. Circuit had given section 1334, there is not the slightest hint that Congress wanted to preempt anything other than "affirmative requirements" imposed under state law, which is all that the *Banzhaf* court said was covered. *See* 405 F.2d at 1090. It is particularly significant that the Senate Report specifically mentioned *Banzhaf* and its preemption ruling, yet Congress did nothing to change it. 1969 Senate Report at 7. *See also* H.R. Rep. No. 91-289, 91st Cong., 1st Sess. 3 (1969) (discussion prior to Supreme Court action).<sup>2</sup>

<sup>2</sup>The industry has suggested that the phrase "State law" in section 1334(b) indicates that Congress meant to preempt State common law as well as the items encompassed in the more limited alternative phrase "State statute or regulation," which appeared in an earlier draft. There is, however, no evidence that Congress made this change with that interpretation in mind. In fact, the only legislative history on the subject, in addition to that quoted above, states that the phrase was intended to reach "not only action by State statute but all other administrative actions or local ordinances or regulation by any political subdivision of any State," 1969 Senate Report at 12, a list remarkable for the absence of any reference to state courts or the common law. In conference the Senate version was adopted with

(continued)

It is hardly surprising that Congress did not specifically preempt state common law tort remedies in 1970 because no one, including the cigarette makers, ever asked it to do so. Rather, even after *Banzhaf*, they continued to limit their request for preemption to halting any "restriction or ban on cigarette advertising by any Federal, State, or local government [because] otherwise authority over this national matter will pass from the control of Congress with resultant chaos." Hearing Before the Consumer Subcomm. of Senate Comm. on Commerce, on H.R. 6543, 91st Cong., 1st Sess. 80 (July 22, 1969) (Statement of Joseph F. Cullman, III, Chairman, Philip Morris, Inc.). Mr. Cullman also recognized that, even under his proposal, the authority of the FTC (and presumably similar state agencies) "is specifically preserved with respect to unfair or deceptive acts or practices in the advertising of cigarettes," *id.* at 78, which provides further evidence that the breadth of the Act's preemption provisions is not nearly as sweeping as the industry argues. Subsequently (at 102), Mr. Cullman expressed concern about states and localities "[r]equiring different health warnings [and] banning cigarette advertising in a particular locality," concerns that have nothing to do with state common law torts.

Then, in 1984, Congress for the first time required warnings to be placed in advertisements as well as on packages. The fact that Congress finally decided to include advertising disclosure requirements in subsections 4(a)(2) and (3) of the 1984 law (Add. 13-15) supports the conclusion that state tort law claims that cigarette manufacturers violated their duty to warn or engaged in false and misleading advertising prior to 1984 were not preempted since, until then, there was no Congressionally-mandated warning for cigarette advertisements.

"minor technical changes." 1970 Conf. Rep. at 5 (Amend. 3). By contrast, the definition of "State law" in ERISA that is used in its expansive preemption provision, specifically includes "decision" and "other State action having the effect of law." 29 U.S.C. § 1144(c)(1), discussed in *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 482-83 (1990).



**B. The Act Did Not Preempt State Tort Laws That Have The Effect Of Requiring That Cigarette Manufacturers Provide Consumers an Adequate Warning.**

**1. The Analytic Framework.**

There are two kinds of preemption: express and implied. In none of the five federal appeals court decisions finding preemption under the Labeling Act have the courts found express preemption.<sup>3</sup> Indeed, the Third Circuit's ruling here, which was followed by the courts in *Stephen, Palmer, Roysdon*, and *Pennington*, specifically held that the Labelling Act did *not* expressly preempt state tort remedies. 789 F.2d at 185-86; 825 F.2d at 313; 849 F.2d at 234; 876 F.2d at 418. But in relying on implied preemption, when Congress had provided for a limited, express preemption in section 1334, the courts acted contrary to the teachings of this Court's preemption decision in *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

At issue in *California Federal* was whether Title VII of the Civil Rights Act preempted California's pregnancy leave statute. The holding -- that there was no preemption in that case -- is not significant here; what is important is that the Court based its analysis on the express preemptive language that Congress used in the statute (or, as Justice Scalia described them, "*anti-preemption provisions*," *id.* at 295, emphasis in original), not on implications from the rest of Title VII. As Justice Marshall explained for the majority, "there is no need to infer congressional intent to preempt state laws" because Congress stated its intention in two separate parts of the Civil Rights Act. *Id.* at 282. Similarly, in *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987), the Court refused to embark on an implied preemption analysis in interpreting the Coastal Zone Management Act. As Justice O'Connor wrote for the Court:

<sup>3</sup>*Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986), cert. denied, 479 U.S. 1043 (1987); *Palmerv. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987); *Roysdon v. R.J. Reynolds Co.*, 849 F.2d 230 (6th Cir. 1988); *Pennington v. Vistrion Corp.*, 876 F.2d 414 (5th Cir. 1989).

Congress has provided several clear statements of its intent regarding the pre-emptive effect of the CZMA; those statements, which indicate that Congress clearly intended the CZMA *not* to be an independent cause of preemption except in cases of actual conflict, end our inquiry. *Id.* at 591 (emphasis in original).

This Court's refusal to wander into the largely uncharted and speculative waters of implied preemption makes eminent sense, because, as is universally recognized, the issue of preemption is decided by ascertaining congressional intent, see e.g. *California Federal*, *supra* at 689, and cases cited there. As the Minnesota Court of Appeals observed in *Forster v. R.J. Reynolds Tobacco Co.*, 423 N.W. 2d 691, 696 (1988), *aff'd in part, rev'd in part*, 437 N.W. 2d 655 (Minn. 1989):

There is no more reliable indication of what Congress intended to preempt on a given subject than what it expressly preempted in the statute. It is one thing for courts to try to divine congressional intent from the overall operation of a statute and its legislative history when Congress has been silent, but it is quite another to do so when Congress has included specific provisions, as it did in 15 U.S.C. § 1334, expressly addressing what it intended to preempt.

Not only do such quests for congressional intent of implied preemption involve enormous commitments of judicial resources, but they force courts to engage in the kind of speculative balancing of interests which they claim Congress engaged in, but somehow left out of the express preemption portion of the statute. Such a process inevitably thrusts courts into a quasi-legislative role of finding the appropriate "balance" among competing interests, see *Palmer*, *supra*, 825 F.2d at 626, a role for which there is no justification when Congress has spoken on the subject. Or, as this Court recently observed, "The best evidence of [congressional] purpose is the statutory text adopted by both Houses of Congress and submitted to the President." *West Virginia University Hospi-*



*tals, Inc. v. Casey*, 111 S. Ct. 1138, 1147 (1991).<sup>4</sup>

Congress plainly and expressly stated its intent in 15 U.S.C. § 1334, a section that it entitled "Preemption." That section, interpreted in light of the remainder of the Act and its legislative history, should be the sole focus of the Court's inquiry. Because all of the courts that have found preemption have gone beyond the express preemption section, they committed error.<sup>5</sup>

## 2. There Is No Express Preemption.

To find express preemption, the cigarette companies must show that a common law tort action based on a duty to warn is a "requirement or prohibition based on smoking and health . . . imposed under State law with respect to the advertising or promotion of . . . cigarettes . . .," as that phrase is used in section 1334(b). We do not argue that, simply because the state remedy is one for money damages, it could never be preempted by a federal statute. Nor do we argue that in no circumstances could the terms "requirement or prohibition" be construed to mandate preemption of tort remedies. We only argue that, for the reasons set forth below, such a construction is wholly unwarranted under this statutory scheme, a conclusion also reached by the Third Circuit *here*. 789 F.2d at 185-86.

<sup>4</sup>The issue of whether to imply preemption is similar to the issue of whether to imply a private cause of action, based on a federal statute. See *Thompson v. Thompson*, 484 U.S. 174 (1988). The single most important distinction between this case and the implied causes of action cases is that here Congress has already spoken by creating a limited express preemption defense, and the issue is whether it intended to go further, but failed to do so by neglect. While there may be reasons to go beyond the face of a statute when Congress has been silent, there is no reason to do it (and every reason not) when Congress has spoken directly to the issue.

<sup>5</sup>The only case in this Court that *amici* have discovered in which the Court found implied preemption, after rejecting express preemption, is *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), but the argument raised here was neither briefed there, nor discussed in the opinion. In *Ingersoll Rand, supra*, the Court relied on an implied conflict preemption argument as well as a finding of express preemption. Three Justices relied only on the conflict.

In our view, the best way to understand what Congress meant by "requirements or prohibitions" is to trace through the language used by it first in the 1965 and then in the 1970 amendments. This history shows that Congress meant to include only those state laws that imposed mandatory duties on the cigarette companies, and no more. The 1965 language could not possibly bear any other meaning (Add. 6), and there is no indication that Congress intended to expand the preemption provisions when they were modified slightly in 1970. Perhaps most significantly of all, the D.C. Circuit had narrowly construed the 1965 provision in 1968, Congress was specifically aware of that ruling, and it never considered broadening that provision, undoubtedly because the industry never asked it to do so. Under these circumstances, the proper interpretation of section 1334(b) is that it does not include state tort claims such as petitioner's.

Another way to analyze section 1334(b) is to consider what kinds of state laws are preempted by it and to ask whether the concerns which motivated Congress in those paradigm situations also apply to state tort claims. There can be no doubt that, if New Jersey passed a statute requiring all cigarette ads to state that "Cigarette Smoking Causes Death From Cancer, Heart Disease, and Emphysema," it would be an unenforceable "requirement" under section 1334(b). Nor could New Jersey achieve that goal by the backdoor method of prohibiting all cigarette ads unless they contained that warning. It was the possibility of multiple, mandatory state warning requirements, which cigarette companies could not satisfy without producing separate ads and separate packages for each state, that led to inclusion of the preemption section in the 1965 Act. *Banzhaf, supra*, 405 F.2d at 1090.

By contrast, state tort law operates quite differently. It does not tell a manufacturer that it must do this, or that it may not do that. A manufacturer of a hazardous product has a duty to warn its customers, but the choice of how that warning will be conveyed is up to each individual producer. Stated another way, the state sets the goals, and the company chooses the means to achieve them. Among those means are package inserts, public service advertisements, and general educational programs on the connection between smoking and its dangers to health. The distinction

between means and ends is hardly an academic one, but has important consequences in the real world of commerce and in assessing the need for federal preemption.<sup>6</sup> Thus, it is simply not the case that a decision rejecting the preemption defense would require cigarette manufacturers to use a warning different from those mandated by Congress. See *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988) (rejecting preemption, based on claims of "incidental regulatory effects," and noting that "[a]ppellant may choose to disregard Ohio safety regulations and simply pay an additional workers' compensation award if an employee's injury is caused by a safety violation").

The goal of New Jersey tort law is adequate disclosure, and there is nothing in the Labeling Act to the contrary. In fact, the Labeling Act is designed to enhance, not cut off, information flow, even if the means available to do so are partially limited. If New York or North Carolina have different goals than New Jersey -- either greater or lesser disclosure -- the differences between the states create no problems for the cigarette companies because a producer can comply with all by meeting the standards of the most stringent. It is only when the state seeks to dictate the means, generally by "requiring" or "prohibiting" specific conduct or specific statements, that the potential for conflict arises.

Not only does the line between means and ends help explain the difference between a "requirement," which is forbidden, and a general duty to warn, which is not, but the legislative history of the Act reflected only a concern with conflicts in the former, not in the latter. In particular, the 1970 congressional reenactment and amendment of the Labeling Act, in the face of the narrow reading given the prior version in *Banzhaf*, 405 F.2d at 1090, supports this limited reach of the term "requirement or prohibition." There is nothing in the history of the 1970 Act that suggests that Congress meant anything more by the term "prohibition" than the converse of a "requirement," i.e., to prevent indirect as

<sup>6</sup>This distinction is similar to that between a regulation intended to achieve a particular performance level, and one which established the means or the design of the equipment by which the regulatory goal is to be met. See S. Breyer, *Regulation and Its Reform* 105 (Harv. Univ. 1982).

well as direct impositions of mandatory standards, or, as the 1969 Senate Report noted, to prevent states from prohibiting all cigarette advertising. See p. 12, *supra*. In the face of this history, which the industry has generally sidestepped by never citing *Banzhaf*, the conclusion is overwhelming that Congress did not intend to expand the narrow scope of the preemption provision of the original section 1334(b) when it reenacted it, in slightly modified form, in 1970. See, e.g., *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change").

Finally, section 1334(b) should not be interpreted to apply to common law torts because the industry never asked Congress for that protection, and Congress never considered giving it to them. As this Court recently observed in an analogous context, "the fact that Congress did not even *consider* the issue readily disposes of any argument that Congress unmistakably intended to divest state courts of concurrent jurisdiction [over RICO claims]." *Tafflin v. Levitt*, 110 S. Ct. 792, 796 (1990) (emphasis in original); *id.* at 800-803 (Scalia and Kennedy, concurring on ground that divestiture should be based solely on express provision in statute). In short, while section 1334(b) recognizes certain legitimate claims that the cigarette companies have in avoiding multiple, conflicting obligations, it in no way supports the broad preemption urged by the industry, as every court to consider it has held.

### 3. There Is No Implied Preemption.

As explained above, once express preemption is found wanting, the Court's inquiry should be at an end, unless it is actually impossible to comply with both state and federal law. Nonetheless, all of the courts that have found preemption have based their rulings on the doctrine of implied preemption, relying principally on the Declaration of Policy in section 1331. In order for respondents to establish implied preemption, they must show that permitting this lawsuit to proceed would frustrate the goals of the Labeling Act. The most complete response to this argument is contained in the opinion of the Texas Court of Appeals, Third District, in *Carlisle v. Philip Morris, Inc.*, 805 S.W. 2d 498, 509-517



(1990). *Amici* will not repeat those arguments, but simply supplement them.

At the outset, it is vital to recall that Congress had two goals in mind in the Act. The first and principal goal, which is set forth in section 2(1) of the 1965 Act (Add. 4), is that the public be "adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes." As the 1965 House Report stated (at 1), the "Principal Purpose of the bill is to provide adequate warning to the public of the potential hazards of cigarette smoking . . ." Thus, this goal of informing consumers of the dangers of smoking -- the 1965 statute was named the "Cigarette Labeling and Advertising Act," the 1970 Act was called the "Public Health Cigarette Smoking Act," and the 1984 law was denominated the "Comprehensive Smoking Education Act" -- must be considered in any implied preemption calculus.<sup>7</sup>

First, there is no basis for a claim that Congress thought that the package warning was adequate to convey all the information that consumers might need. That very claim was rejected in *Banzhaf*, where the court found "no sufficiently persuasive evidence that Congress hoped to impede the flow of adequate information for fear that, if the public knew all the facts, too many of them would stop smoking." 405 F.2d at 1090.

Second, Congress' declaration that it intended to provide some protection to the tobacco industry is substantially qualified. Thus, it was the stated policy under section 1331(2) that "com-

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<sup>7</sup>One indication that Congress did not pay much attention to the precise language in the declaration of its purpose is that when it strengthened the label in 1970, it left the very weak "may be hazardous" language in that declaration. It did amend the declaration in 1984 to include a reference to the newly imposed requirements for advertisements, see section 6(a), but even then the declaration referred only to "any adverse health effects of cigarette smoking" (Add. 21), although the new rotational labels are clear in their assertion of a direct causal connection between smoking and adverse health effects. See section 4(a) (Add. 16-17). Furthermore, the original Senate bill did not contain any of these declarations of purpose, thereby suggesting that they were not intended to have the central role found by the court of appeals. See 1965 Senate Report.

merce and the national economy may be (A) protected to the maximum extent consistent with this declared policy [of informing consumers about the hazards of smoking]." But the problem that the preemption provision was designed to remedy is specified in subsection 1331(2)(B) as "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." What is important about this phrase is the limited nature of the concerns expressed -- "diverse, nonuniform, and confusing cigarette labeling and advertising regulations." Insofar as Congress was concerned about *labeling*, there is no doubt that section 1334(a) provides full protection from all of these expressed concerns. And for *advertising*, the problems expressed there are limited to regulations (presumably both state and federal) that are "diverse, nonuniform [the difference between them is not clear], and confusing." The elimination of "confusing" regulations or laws is hardly a matter needing federal preemption, since that should be a goal at all levels of government. As for the other concerns, they are no more than the fear, legitimate but limited, about inconsistent affirmative requirements, that could be satisfied only by producing different packages or advertisements for different states, a concern which was specifically identified in the legislative history as being the basis for federal preemption. See pp. 7-8, 11-13, *supra*. Beyond these specific concerns, there is nothing to indicate that Congress wanted to ensure continued high levels of cigarette sales; it simply did not want conflicting state warning requirements to interfere with interstate commerce in cigarettes.

Despite the quite narrow language in section 1331, and the fact that it is merely a statement of purpose and not an operative part of the Act, the Third Circuit relied on it because it "reveals that the Act represents a carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of national economy. See *Banzhaf*, 405 F.2d at 1090." 789 F.2d at 187. Reading sections 1331 and 1334 together, the court concluded "that this balance would be upset by either a requirement of a warning other than that prescribed in section 1333 [dealing with package labeling] or a requirement or prohibition based on smoking and health with respect to the advertising or promotion of cigarettes. See 15



U.S.C. § 1334.” *Id.* (emphasis in original). The court accepted the industry’s assertion that “state common law damage actions have the effect of requirements that are capable of creating ‘an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *Id.* It then held that “the Act preempts those state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party’s actions with respect to the advertising or promotion of cigarettes,” including any claim that “necessarily depends on the assertion that a party bore the duty to provide a warning to consumers in addition to the warning Congress has required on cigarette packages . . . .” *Id.* (footnote omitted).

Two fundamental errors pervade the Third Circuit’s approach. First, it finds a careful overall balance where there is none. Indeed, the very case that it cites for this proposition, *Banzhaf v. FCC*, reached precisely the opposite conclusion when it permitted the FCC to increase the flow of information, which is precisely what the Third Circuit said was impermissible. While Congress forbade the states from altering the contents of the warning label or imposing affirmative warnings in cigarette advertising, it did so in response to the narrow problem of avoiding directly conflicting obligations, which is plainly not the problem here. Particularly since Congress included a specific preemption provision in section 1334, it was wholly inappropriate for the Third Circuit to have, in effect, added a new subsection to it. That is a job for Congress, not the courts. See *Banzhaf, supra*, 405 F.2d at 1089.

The second error of the court of appeals is that it apparently assumed that the duties under state law could only have been met by altering the warning label on the package and that the Act itself imposes “advertising and promotion obligations” -- neither of which is correct. Respondents had other means of complying with New Jersey law in order to advise Mrs. Cipollone of the hazards of smoking. See p. 17, *supra*. None of them involved altering the federal package warning label, and none of them would have resulted in a violation of advertising or promotion requirements imposed by Congress, since there were none until after Mrs. Cipollone died, although in 1972 the FTC and the industry agreed

that thereafter cigarette advertisements would contain the warning label used on cigarette packages. While some state tort law claims, in some other schemes, may impermissibly tip the balance and harm a protected federal interest, the result of Third Circuit’s ruling is to protect the pocketbooks of the cigarette makers by insulating them from all state tort law claims for failing to warn of the dangers of smoking.

In *Palmer, supra*, the First Circuit accepted a variation on this theme by suggesting that it was “inconceivable that Congress intended to have that carefully wrought balance of national interests superseded by the views of a single state, indeed, perhaps a single jury in a single state.” 825 F.2d. at 626. According to *Palmer* and the cigarette makers, this sweeping preemption was intended even though Congress never required any warning whatsoever in cigarette advertising until 1984. While some federal statutes may so thoroughly regulate an activity that there is no room left for states to act, Congress did not occupy the field in the Labeling Act, a conclusion that is underscored by the specific, but limited express preemption provisions in section 1334.

In our view, the legislative history of the three acts, and in particular the failure to alter the rationale and result in *Banzhaf*, conclusively show that Congress made no judgment that all other federal and state efforts to increase the flow of information about the dangers of smoking were forbidden. It simply set a floor on mandating labeling information, and decided that congressionally imposed advertising warnings were not justified until 1984. See 1965 House Report at 5; 1965 Senate Report at 5. Unless the states overstep the specific limits imposed by section 1334, they are free to employ their general tort laws to reduce the terrible toll from smoking -- a goal wholly consistent with that of the Labeling Act.

### C. Congress Did Not Preempt the States From Redressing Injuries Caused by False and Misleading Advertising.

In addition to contending that respondents failed to provide enough information, petitioner claims that respondents affirma-

tively misled the public in general, and Mrs. Cipollone in particular, into believing that their cigarettes were safe. Unlike the inadequate warning claim, in which petitioner argues that respondents said too little, this claim charges that they said too much, *i.e.*, that their advertising claims were false and misleading and/or that the intended effect of their advertising was to negate the mandatory warning labels on the packages and, after 1972, in their ads. Despite the significant difference between these two claims, industry briefs in these cases rarely mention the false advertising claim, and almost never analyze the scope of preemption as applied to it.<sup>8</sup>

The one appellate court to focus on the special nature of a claim based on false and misleading advertising held that such a claim is not preempted by the Act. *Forster, supra*, 437 N.W.2d at 661-62. The Minnesota Supreme Court specifically distinguished this claim from one based on failure to warn since this tort "is based on a duty to tell the truth, not a duty to warn"; since it is based on "the falsity of what the cigarette manufacturer has chosen to say," not what it has failed to say; and since any conflict with the Act "is indirect and self-imposed by the cigarette manufacturer." *Id.* at 662.

To find in this situation an implied preemption, we would have to assume that Congress intended the Act to be a license to lie, an assumption both uncharitable to Congress and violative of this state's deep concern for honesty as well as health.

Indeed, it is clear Congress did not intend cigarette advertisers to be free to engage in deceitful advertising practices because it expressly provided in the Act for the Federal Trade Commission to act in such instances. Section 5(b) of the 1965 Act. *Cf. Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). *Id.*

<sup>8</sup>In both 1965 and 1969 the Senate expressed concern that the effect of cigarette advertising might be to negate the warning labels, but made it clear that the FTC could proceed against such ads as unfair or deceptive acts or practices. See 1965 Senate Report at 6; 1969 Senate Report at 8.

The clearest proof of the weakness of the assertion that false advertising claims are also preempted is that Congress did nothing in 1965 and 1970 to regulate the content of cigarette advertising; it simply mandated warning labels on cigarette packages. Everything else about the advertising practices of the cigarette makers was left up to them, at least until 1972, when the FTC consent order required that warnings also be placed in their ads. In essence, respondents' position leads to the conclusion that Congress, which took no action on cigarette advertising until 1984, intended to make the states powerless, by any means whatsoever, to control even the most patently misleading cigarette ads, no matter how little the FTC chose to do under its general powers to police misleading advertisements. There is simply no basis for inferring that Congress intended to confer on the cigarette companies a license to deceive. See *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988) (no intent to preempt field that Congress has left unregulated).<sup>9</sup>

Once again, history fortifies our position. As noted above, the D.C. Circuit in *Banzhaf* was faced with a similar preemption claim relating to the FCC's jurisdiction under the fairness doctrine, and the court soundly rejected that attempt to keep the public in the dark about the dangers of smoking:

Nothing in the Act indicates that Congress had any intent at all with respect to other types of regulation [beyond placing warnings on packages] by other agencies -- much less that it specifically meant to foreclose all such regulation.

405 F.2d at 1089. Faced with this ruling, which it specifically noted, Congress reenacted substantially the same preemption language in section 1334(b), hardly what would be expected if it

<sup>9</sup>Under our analysis, states could also impose monetary penalties or obtain injunctions against misleading claims in cigarette advertising, as well as use their tort law to control such practices. Just as with the duty to warn, the means chosen by the state to exercise its regulatory authority is rarely the touchstone to preemption, and it is not the case here either.



wanted to change the result in *Banzhaf* and deny states the power to control deceptive cigarette advertising.

Furthermore, *Banzhaf's* interpretation--that section 1334(b) is limited to preemption of "affirmative requirements"--was the foundation for the 1970 reenactment. The fact that this section remained basically unchanged suggests that the phrase "requirement or prohibition" in the 1970 version was meant to continue the narrow scope of the preemption provision, especially in the absence of any indication that Congress intended to broaden it. See *Lorillard v. Pons, supra*. Under no conceivable reading could a ban on states imposing "affirmative requirements" be considered to preclude a remedy for violating a state rule forbidding false and misleading advertising, where the violator chose the terms of the unlawful advertisement itself. While the term "prohibition," standing on its own, might be read to reach such a case, there is no reason to believe that Congress intended it to be so all-encompassing here. Rather, the history of the preemption provision shows that it was only intended to prevent states from imposing differing, affirmative obligations on cigarette makers, and there is no hint that the traditional power of the states to police false and misleading advertising, and to offer redress to consumers injured by it, was being eliminated just because the product was a cigarette.<sup>10</sup>

The fallacy in the industry's position can also be seen by taking an example involving a cigarette ad from the 1930s, bringing it into the Labeling Act era, and applying this analysis to a state law claim based on it. The FTC found that R.J. Reynolds advertised that

<sup>10</sup>Indeed, the manufacturer in *Forster* went so far as to suggest to the Minnesota Supreme Court (Br. 25) that if Minnesota passed a law banning all sales of cigarettes (or even all sales to persons under age 14, or to women who are pregnant), the existence of the warning label would preclude Minnesota from enforcing that law. Similarly, in *Kyte v. Philip Morris Inc.*, 408 Mass. 162, 556 N.E.2d 1025 (1990), the company argued that the Labeling Act preempted a claim that its promotional campaign, which was directed at selling cigarettes to children, who were forbidden by state law from purchasing them, resulted in teenagers becoming addicted to cigarettes. Because the majority found that the complaint did not state a claim for relief under Massachusetts law, it did not reach the preemption issue.

"the wind and physical condition of athletes will not be impaired by the smoking of Camel cigarettes, as many as one likes . . . and that the smoking of Camels is not disadvantageous to breathing capacity during an athletic contest." *In the Matter of R.J. Reynolds Tobacco Company*, 46 F.T.C. 706, 720 (1950). The Commission found these claims to be "false, deceptive, and misleading," *id.* at 727-28, and ordered the company to cease and desist from making them. *Id.* at 733. It is undisputed that nothing in any version of the Labeling Act would have prevented the FTC from bringing an action against Reynolds or any other company that made such claims. Yet by the industry's logic, if a person had relied on those claims, and was injured as a result of them, for example, by losing his job on a professional athletic team, his state tort law claims based on false and deceptive advertising would be preempted. There is, we submit, not a word in the Act or a shred of legislative history to suggest that Congress intended such a bizarre result, but that is precisely where respondents' arguments inevitably lead.

At various times, the industry has suggested that it would be unfair to hold companies liable under state tort law for complying with federal requirements. Whatever force that argument may have on the duty to warn claim -- and we think it has none in light of the various alternatives available to them for providing this information -- it vanishes entirely on the false advertising claim. Thus, it is surely not unfair to require a cigarette maker to answer for the deliberate excesses of its advertisements, which were designed to sell its products. If petitioner can prove that respondents' ads were false and misleading, that they caused Mrs. Cipollone to believe that the cigarettes she smoked were safe, and that smoking them resulted in her death, the Labeling Act was not intended to relieve respondents from their common law tort liability for the injuries they caused, particularly since Congress gave their victims no alternative federal remedy. See *Silkwood v. Kerr-McGee Corp.*, 484 U.S. 238, 251 (1984). In balancing the interests of cigarette makers, who deceived consumers into believing that their products were safe, and consumers, who believed the ads and who died because they trusted them and continued smoking, Congress did not intend to give the manufacturers a blanket tort immunity for their deceptive practices. Yet stripped of all the legal niceties, that is the essence of the industry's preemption claim.



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There is one final point that is applicable to both claims. When Congress passed the 1984 amendments to the Labeling Act, the preemption issue was just beginning to be litigated. In fact, shortly before the 1984 Act became law, the district court in this case rejected the defense. *See* Pet. App. 109a. But in 1986, after the preemption issue had gained public prominence, but before the Third Circuit's decision in this case, Congress addressed this issue in a bill that had an identical purpose as the Labeling Act, the Comprehensive Smokeless Tobacco Health Education Act of 1986, Public Law 99-252, 100 Stat. 30, 15 U.S.C. § 4401. Like the 1984 Labeling Act for cigarettes, this law required warning labels for smokeless tobacco products for both packages and advertisements, and it outlawed radio and television advertising. Section 7 of that Act deals with preemption in three subsections. While there are some differences between the first two of these provisions and subsections 1334(a) and (b), they are basically the same as those in the Labeling Act. On the other hand, the final provision answers the question for smokeless tobacco that is at issue for cigarettes in this case: "(c) Effect on Liability Law. -- Nothing in this Act shall relieve any person from liability at common law or under state statutory law to any other person."

The industry has argued that this provision shows that Congress knows how to avoid preemption of state tort law when it wants to do so. In our view, however, this provision sends an entirely different message: as soon as Congress became aware that manufacturers of dangerous products were claiming that federal laws, designed principally to educate consumers about these dangers, were being used to defeat state common law claims for damages caused by these dangerous products, it acted to prevent that kind of misuse of federal law. Although Congress did not speak directly on this question in 1984 for tobacco used in cigarettes, it did so in 1986 for tobacco used in smokeless products. Having decisively rejected tort law preemption for smokeless tobacco products, there is no reason to believe that Congress "intended" to treat tobacco used in cigarettes any differently, but failed to say so.

## CONCLUSION

The judgment of the court of appeals upholding respondents' claim of preemption should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

Alan B. Morrison  
(Counsel of Record)

David C. Vladeck  
Cornish F. Hitchcock

Public Citizen Litigation Group  
2000 P Street, N.W.  
Suite 700  
Washington, D.C. 20036  
(202) 833-3000

Attorneys for *Amici* American Cancer Society, American College of Cardiology, American Heart Association, American Lung Association, American Public Health Association, and Public Citizen

May 23, 1991

**INTEREST OF AMICI**

The American Cancer Society is the world's largest voluntary health organization. Its membership consists of 2.3 million volunteers, including over 50,000 physicians. The Society has 58 divisions and 3,400 unit organizations located in every state in the United States. The Society's sole purpose is the control and elimination of cancer through research, education, and service. In 1986 it supported more than \$80 million in cancer-related research. Research supported by the Society has played an important role in the identification of cigarette smoking as a major cause of cancer in the United States. The Society devotes a substantial portion of its educational funds to better and more effectively informing the American public about the relationship between cancer and smoking.

The American College of Cardiology is an 18,000 member non-profit professional medical society and teaching institution whose purpose is to foster optimal cardiovascular care and disease prevention through professional education, promotion of research, and leadership in the development of standards and formulation of health care policy. The College is a strong advocate of efforts to reduce the incidence of heart disease due to cigarette smoking.

The American Heart Association is this nation's second largest voluntary health organization whose mission is to reduce disability and death from cardiovascular diseases and stroke, this nation's number one cause of death. Cigarette smoking has been identified as a major risk factor for cardiovascular disease. A smoker's risk of heart attack is more than twice that of a non-smoker. Cigarette smoking is the biggest risk factor for sudden cardiac death (a risk that is two to four times higher than that of a nonsmoker), and the biggest risk factor for peripheral vascular disease. Because of this, the Heart Association devotes a portion of its resources to research and educational efforts aimed at reducing cigarette smoking. Each year 3.2 million volunteers actively work in over 2,000 state and local divisions across the country to carry out the Heart Association's mission.

The American Lung Association is this nation's oldest voluntary health organization, with 144 associations in all 50 states.



Originally established in 1904 to reduce the incidence of tuberculosis, the Association broadened its work many years ago to address the full range of issues concerning the prevention, control, and cure of lung disease, through community education, professional programs, and the support of pulmonary research and professional education on both the national and local levels. The Lung Association has over 150,000 volunteers, including most of the nation's leading pulmonary physicians who belong to its medical section, the American Thoracic Society. Since cigarette smoking is the major cause of chronic obstructive pulmonary disease, including emphysema and chronic bronchitis, the Lung Association devotes a substantial portion of its resources to research and education efforts about the relationship between smoking and lung disease.

The American Public Health Association, founded in 1872, is the oldest and largest professional public health society in the world, with combined national and affiliate membership of over 50,000 health professionals. Its members include physicians, dentists, nurses, social workers, and other health professionals, as well as academics and researchers specializing in public health matters. The Association publishes the American Journal of Public Health, a monthly peer review journal widely recognized in the field. The Association works to promote the health of the American people by advancing the availability of health services, encouraging a safe and healthy environment, launching public health education programs, and publishing numerous materials reflecting developments in public health. For many years, it has engaged in public education projects emphasizing the health hazards of smoking, which it has determined to be the number one preventable health hazard, as to both mortality and morbidity.

Public Citizen is a non-profit, public interest organization with approximately 105,000 members. Principally through its Health Research Group, it has worked to increase public knowledge about the health hazards of smoking, to calculate and publicize the economic costs of smoking, and to obtain more rational smoking policies in hospitals and workplaces. It was also instrumental in calling the public's attention to the dangers from smokeless tobacco and in persuading Congress to pass the Comprehensive Smokeless Tobacco Health Education Act of 1986.

## STATUTORY ADDENDUM

### Federal Cigarette Labeling and Advertising Act

Public Law 89-92 (July 27, 1965)

### DECLARATION OF POLICY

SEC. 2. It is the policy of the Congress, and the purpose of this Act, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby--

(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

### DEFINITIONS

SEC. 3. As used in this Act--

(1) The term "cigarette" means--

(A) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and

(B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A).

(2) The term "commerce" means (A) commerce between any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston



#### ADD. 4

Island and any place outside thereof; (B) commerce between points in any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island, but through any place outside thereof; or (C) commerce wholly within the District of Columbia, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island.

(3) The term "United States", when used in a geographical sense, includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, and Johnston Island.

(4) The term "package" means a pack, box, carton, or container of any kind in which cigarettes are offered for sale, sold, or otherwise distributed to consumers.

(5) The term "person" means an individual, partnership, corporation, or any other business or legal entity.

(6) The term "sale or distribution" includes sampling or any other distribution not for sale.

#### LABELING

SEC. 4. It shall be unlawful for any person to manufacture, import, or package for sale or distribution within the United States any cigarettes the package of which fails to bear the following statement: "Caution: Cigarette Smoking May Be Hazardous to Your Health." Such statement shall be located in a conspicuous place on every cigarette package and shall appear in conspicuous and legible type in contrast by typography, layout, or color with other printed matter on the package.

#### PREEMPTION

SEC. 5. (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.

(b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which

#### ADD. 5

are labeled in conformity with the provisions of this Act.

(c) Except as is otherwise provided in subsections (a) and (b), nothing in this Act shall be construed to limit, restrict, expand, or otherwise affect, the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes, nor to affirm or deny the Federal Trade Commission's holding that it has the authority to issue trade regulation rules or to require an affirmative statement in any cigarette advertisement.

(d)(1) The Secretary of Health, Education, and Welfare shall transmit a report to the Congress not later than eighteen months after the effective date of this Act, and annually thereafter, concerning (A) current information on the health consequences of smoking and (B) such recommendations for legislation as he may deem appropriate.

(2) The Federal Trade Commission shall transmit a report to the Congress not later than eighteen months after the effective date of this Act, and annually thereafter, concerning (A) the effectiveness of cigarette labeling, (B) current practices and methods of cigarette advertising and promotion, and (C) such recommendations for legislation as it may deem appropriate.

#### CRIMINAL PENALTY

SEC. 6. Any person who violates the provisions of this Act shall be guilty of a misdemeanor and shall on conviction thereof be subject to a fine of not more than \$10,000.

#### INJUNCTION PROCEEDINGS

SEC. 7. The several district courts of the United States are invested with jurisdiction, for cause shown, to prevent and restrain violations of this Act upon the application of the Attorney General of the United States acting through the several United States attorneys in their several districts.

#### CIGARETTES FOR EXPORT

SEC. 8. Packages of cigarettes manufactured, imported, or

## ADD. 6

packaged (1) for export from the United States or (2) for delivery to a vessel or aircraft, as supplies, for consumption beyond the jurisdiction of the internal revenue laws of the United States shall be exempt from the requirements of this Act, but such exemptions shall not apply to cigarettes manufactured, imported, or packaged for sale or distribution to members or units of the Armed Forces of the United States located outside of the United States.

### SEPARABILITY

SEC. 9. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the other provisions of this Act and the application of such provision to other persons or circumstances shall not be affected thereby.

### TERMINATION OF PROVISIONS AFFECTING REGULATION OF ADVERTISING

SEC. 10. The provisions of this Act which affect the regulation of advertising shall terminate on July 1, 1969, but such termination shall not be construed as limiting, expanding, or otherwise affecting the jurisdiction or authority which the Federal Trade Commission or any other Federal agency had prior to the date of enactment of this Act.

### EFFECTIVE DATE

Sec. 11. This Act shall take effect on January 1, 1966.

## ADD. 7

### Public Health Cigarette Smoking Act of 1969

Public Law 91-222 (April 1, 1970)

SEC. 2. Sections 2 through 10 of Public Law 89-92 (15 U.S.C. 1331-1338) are amended to read as follows:

### "DECLARATION OF POLICY

"SEC. 2. It is the policy of the Congress, and the purpose of this Act, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby--

"(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

"(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

### "DEFINITIONS

"SEC. 3. As used in this Act--

"(1) The term 'cigarette' means--

"(A) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and

"(B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A).

"(2) The term 'commerce' means (A) commerce between any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island and any place outside thereof; (B) commerce between



## ADD. 8

points in any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island, but through any place outside thereof; or (C) commerce wholly within the District of Columbia, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island.

“(3) The term ‘United States’, when used in a geographical sense, includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, and Johnston Island. The term ‘State’ includes any political division of any State.

“(4) The term ‘package’ means a pack, box, carton, or container of any kind in which cigarettes are offered for sale, sold, or otherwise distributed to consumers.

“(5) The term ‘person’ means an individual, partnership, corporation, or any other business or legal entity.

“(6) The term ‘sale or distribution’ includes sampling or any other distribution not for sale.

## “LABELING

“SEC. 4. It shall be unlawful for any person to manufacture, import, or package for sale or distribution within the United States any cigarettes the package of which fails to bear the following statement: ‘Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health’. Such statement shall be located in a conspicuous place on every cigarette package and shall appear in conspicuous and legible type in contrast by typography, layout, or color with other printed matter on the package.

## “PREEMPTION

“SEC. 5. (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.

“(b) No requirement or prohibition based on smoking and

## ADD. 9

health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

## “UNLAWFUL ADVERTISEMENTS

“SEC. 6. After January 1, 1971, it shall be unlawful to advertise cigarettes on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.

## “FEDERAL TRADE COMMISSION

“SEC. 7. (a) The Federal Trade Commission shall not take any action before July 1, 1971, with respect to its pending trade regulation rule proceeding relating to cigarette advertising. If at any time on or after July 1, 1971, the Federal Trade Commission determines it is necessary to take action with respect to such pending trade regulation rule proceeding, it shall notify the Congress of the determination. Such notification shall include the text of the trade regulation rule and a full statement of the basis for such determination. No trade regulation rule adopted in such proceeding may take effect until six months after the Commission has notified the Congress of the text of such rule, in order that the Congress may act if it so desires.

“(b) Except as provided in subsection (a), nothing in this Act shall be construed to limit, restrict, expand, or otherwise affect the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes.

“(c) Nothing in this Act shall be construed to affirm or deny the Federal Trade Commission’s holding that it has the authority to issue trade regulation rules or to require an affirmative statement in any cigarette advertisement.

## “REPORTS

“SEC. 8. (a) The Secretary of Health, Education, and Welfare shall transmit a report to the Congress not later than January 1, 1971, and annually thereafter, concerning (A) current informa-



tion in the health consequences of smoking, and (B) such recommendations for legislation as he may deem appropriate.

“(b) The Federal Trade Commission shall transmit a report to the Congress not later than January 1, 1971, and annually thereafter, concerning (A) the effectiveness of cigarette labeling, (B) current practices and methods of cigarette advertising and promotion, and (C) such recommendations for legislation as it may deem appropriate.

#### “CRIMINAL PENALTY

“SEC. 9. Any person who violates the provisions of this Act shall be guilty of a misdemeanor and shall on conviction thereof be subject to a fine of not more than \$10,000.

#### “INJUNCTION PROCEEDINGS

“SEC. 10. The several district courts of the United States are invested with jurisdiction, for cause shown, to prevent and restrain violations of this Act upon the application of the Attorney General of the United States acting through the several United States attorneys in their several districts.

#### “CIGARETTES FOR EXPORT

“SEC. 11. Packages of cigarettes manufactured, imported, or packaged (1) for export from the United States or (2) for delivery to a vessel or aircraft, as supplies, for consumption beyond the jurisdiction of the internal revenue laws of the United States shall be exempt from the requirements of this Act, but such exemptions shall not apply to cigarettes manufactured, imported, or packaged for sale or distribution to members or units of the Armed Forces of the United States located outside of the United States.

#### “SEPARABILITY

“SEC. 12. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the other provisions of this Act and the application of such provision to other

persons or circumstances shall not be affected thereby.”

SEC. 3. Section 5 of the amendment made by this Act shall take effect as of July 1, 1969. Section 4 of the amendment made by this Act shall take effect on the first day of the seventh calendar month which begins after the date of the enactment of this Act. All other provisions of the amendment made by this Act except where otherwise specified shall take effect on January 1, 1970.

#### Comprehensive Smoking Education Act

Public Law 98-474 (October 12, 1984)

#### SHORT TITLE

SECTION 1. This Act may be cited as the “Comprehensive Smoking Education Act”.

#### PURPOSE

SEC. 2. It is the purpose of this Act to provide a new strategy for making Americans more aware of any adverse health effects of smoking, to assure the timely and widespread dissemination of research findings and to enable individuals to make informed decisions about smoking.

#### SMOKING RESEARCH, EDUCATION, AND INFORMATION

SEC. 3. (a) The Secretary of Health and Human Services (hereinafter in this section referred to as the “Secretary”) shall establish and carry out a program to inform the public of any

dangers to human health presented by cigarette smoking. In carrying out such program, the Secretary shall--

(1) conduct and support research on the effect of cigarette smoking on human health and develop materials for informing the public of such effect;

(2) coordinate all research and educational programs and other activities within the Department of Health and Human Services (hereinafter in this section referred to as the "Department") which relate to the effect of cigarette smoking on human health and coordinate, through the Interagency Committee on Smoking and Health (established under subsection (b)), such activities with similar activities of other Federal agencies and of private agencies;

(3) establish and maintain a liaison with appropriate private entities, other Federal agencies, and State and local public agencies respecting activities relating to the effect of cigarette smoking on human health;

(4) collect, analyze, and disseminate (through publications, bibliographies, and otherwise) information, studies, and other data relating to the effect of cigarette smoking on human health, and develop standards, criteria, and methodologies for improved information programs related to smoking and health;

(5) compile and make available information on State and local laws relating to the use and consumption of cigarettes; and

(6) undertake any other additional information and research activities which the Secretary determines necessary and appropriate to carry out this section.

(b)(1) To carry out the activities described in paragraphs (2) and (3) of subsection (a) there is established an Interagency Committee on Smoking and Health. The Committee shall be composed of--

(A) members appointed by the Secretary from appropriate institutes and agencies of the Department, which may include the National Cancer Institute, the National Heart, Lung, and Blood Institute, the National Institute of Child Health and Human Development, the National Institute on Drug Abuse, the Health Resources and Services Administration, and the Centers for Disease Control;

(B) at least one member appointed from the Federal Trade

Commission, the Department of Education, the Department of Labor, and any other Federal agency designated by the Secretary, the appointment of whom shall be made by the head of the entity from which the member is appointed; and

(C) five members appointed by the Secretary from physicians and scientists who represent private entities involved in informing the public about the health effects of smoking.

The Secretary shall designate the chairman of the Committee.

(2) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, in the manner provided by sections 5702 and 5703 of title 5 of the United States Code.

(3) The Secretary shall make available to the Committee such staff, information, and other assistance as it may require to carry out its activities effectively.

(c) The Secretary shall transmit a report to Congress not later than January 1, 1985, and biennially thereafter which shall contain--

(1) an overview and assessment of Federal activities undertaken to inform the public of the health consequences of smoking and the extent of public knowledge of such consequences,

(2) a description of the Secretary's and Committee's activities under subsection (a).

(3) information regarding the activities of the private sector taken in response to the effects of smoking on health, and

(4) such recommendations as the Secretary may consider appropriate.

#### LABELS FOR CIGARETTES AND CIGARETTE ADVERTISING

SEC. 4. (a) Section 4 of the Federal Cigarette Labeling and Advertising Act (15 U.S.C. 1333) is amended to read as follows:

#### "LABELING

"SEC. 4. (a)(1) It shall be unlawful for any person to manufac-



ture, package, or import for sale or distribution within the United States any cigarettes the package of which fails to bear, in accordance with the requirements of this section, one of the following labels:

"SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.

"SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.

"SURGEON GENERAL'S WARNING: Smoking By Pregnant Women may Result in Fetal Injury, Premature Birth, And Low Birth Weight.

"SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

"(2) It shall be unlawful for any manufacturer or importer of cigarettes to advertise or cause to be advertised (other than through the use of outdoor billboards) within the United States any cigarette unless the advertising bears, in accordance with the requirements of this section, one of the following labels:

"SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.

"SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.

"SURGEON GENERAL'S WARNING: Smoking By Pregnant Women may Result in Fetal Injury, Premature Birth, And Low Birth Weight.

"SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

"(3) It shall be unlawful for any manufacturer or importer of cigarettes to advertise or cause to be advertised within the United States through the use of outdoor billboards any cigarette unless the advertising bears, in accordance with the requirements of this section one, of the following labels:

"SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, And Emphysema.

"SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Health Risks.

"SURGEON GENERAL'S WARNING: Pregnant Women

Who Smoke Risk Fetal Injury And Premature Birth.

"SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

"(b)(1) Each label statement required by paragraph (1) of subsection (a) shall be located in the place label statements were placed on cigarette packages as of the date of the enactment of this subsection. The phrase 'Surgeon General's Warning' shall appear in capital letters and the size of all other letters in the label shall be the same as the size of such letters as of such date of enactment. All the letters in the label shall appear in conspicuous and legible type in contrast by typography, layout, or color with all other printed material on the package.

"(2) The format of each label statement required by paragraph (2) of subsection (a) shall be the format required for label statements in cigarette advertising as of the date of the enactment of this subsection, except that the phrase 'Surgeon General's Warning' shall appear in capital letters, the area of the rectangle enclosing the label shall be 50 per centum larger in size with a corresponding increase in the size of the type in the label, the width of the rule forming the border around the label shall be twice that in effect on such date, and the label may be placed at a distance from the outer edge of the advertisement which is one-half the distance permitted on such date. Each label statement shall appear in conspicuous and legible type in contrast by typography, layout, or color with all other printed material in the advertisement.

"(3) The format and type style of each label statement required by paragraph (3) of subsection (a) shall be the format and type style required in outdoor billboard advertising as of the date of the enactment of this subsection. Each such label statement shall be in printed capital letters of the height of the tallest letter in a label statement on outdoor advertising of the same dimension on such date of enactment. Each such label statement shall be enclosed by a black border which is located within the perimeter of the format required in outdoor billboard advertising of the same dimension on such date of enactment and the width of which is twice the width of the vertical element of any letter in the label statement within the border.

"(c) The label statements specified in paragraphs (1), (2), and



(3) of subsection (a) shall be rotated by each manufacturer or importer of cigarettes quarterly in alternating sequence on packages of each brand of cigarettes manufactured by the manufacturer or importer and in the advertisements for each such brand of cigarettes in accordance with a plan submitted by the manufacturer or importer and approved by the Federal Trade Commission. The Federal Trade Commission shall approve a plan submitted by a manufacturer or importer of cigarettes which will provide the rotation required by this subsection and which assures that all of the labels required by paragraphs (1), (2), and (3) will be displayed by the manufacturer or importer at the same time.

"(d) Subsection (a) does not apply to a distributor or a retailer of cigarettes who does not manufacture, package, or import cigarettes for sale or distribution within the United States."

(b) The amendment made by subsection (a) shall take effect upon the expiration of a one-year period beginning on the date of the enactment of this Act.

#### CIGARETTE INGREDIENTS

SEC. 5. (a) The Federal Cigarette Labeling and Advertising Act is amended by redesignating sections 7 through 12 as sections 8 through 13, respectively, and by inserting after section 6 the following new section:

#### "CIGARETTE INGREDIENTS

"SEC. 7. (a) Each person who manufactures, packages, or imports cigarettes shall annually provide the Secretary with a list of the ingredients added to tobacco in the manufacture of cigarettes which does not identify the company which uses the ingredients or the brand of cigarettes which contain the ingredients. A person or group of persons required to provide a list by this subsection may designate an individual or entity to provide the list required by this subsection.

"(b)(1) At such times as the Secretary considers appropriate, the Secretary shall transmit to the Congress a report, based on the

information provided under subsection (a), respecting--

"(A) a summary of research activities and proposed research activities on the health effects of ingredients added to tobacco in the manufacture of cigarettes and the findings of such research;

"(B) information pertaining to any such ingredient which in the judgment of the Secretary poses a health risk to cigarette smokers; and

"(C) any other information which the Secretary determines to be in the public interest.

"(2)(A) Any information provided to the Secretary under subsection (a) shall be treated as trade secret or confidential information subject to section 552(b)(4) of title 5, United States Code and section 1905 of title 18, United States Code, and shall not be revealed, except as provided in paragraph (1), to any person other than those authorized by the Secretary in carrying out their official duties under this section.

"(B) Subparagraph (A) does not authorize the withholding of a list provided under subsection (a) from any duly authorized subcommittee or committee of the Congress. If a subcommittee or committee of the Congress requests the Secretary to provide it such a list, the Secretary shall make the list available to the subcommittee or committee and shall, at the same time, notify in writing the person who provided the list of such request.

"(C) The Secretary shall establish written procedures to assure the confidentiality of information provided under subsection (a). Such procedures shall include the designation of a duly authorized agent to serve as custodian of such information. The agent--

"(i) shall take physical possession of the information and, when not in use by a person authorized to have access to such information, shall store it in a locked cabinet or file, and

"(ii) shall maintain a complete record of any person who inspects or uses the information.

Such procedures shall require that any person permitted access to the information shall be instructed in writing not to disclose the information to anyone who is not entitled to have access to the information."

(b) Section 7 of the Federal Cigarette Labeling and Advertising Act added by subsection (a) shall take effect upon the

expiration of the one-year period beginning on the date of the enactment of this Act.

#### MISCELLANEOUS AMENDMENTS

SEC. 6. (a) Paragraph (1) of section 2 of the Federal Cigarette Labeling and Advertising Act (15 U.S.C. 1331) is amended to read as follows:

“(1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and”.

(b) Section 3 of such Act (15 U.S.C. 1332) is amended by adding at the end the following:

“(8) The term ‘Secretary’ means the Secretary of Health and Human Services.”.

(c) Section 8 of such Act (15 U.S.C. 1336) (as so redesignated) is amended to read as follows:

#### “FEDERAL TRADE COMMISSION

“SEC. 8. Nothing in this Act (other than the requirements of section 4(b)) shall be construed to limit, restrict, expand, or otherwise affect the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes.”.

(d) Section 9 of such Act (15 U.S.C. 1337) (as so redesignated) is amended--

(1) by striking out “of Health, Education, and Welfare” in subsection (a),

(2) by redesignating clauses (A) and (B) in such subsection as clauses (1) and (2), respectively,

(3) by striking out clause (A) in subsection (b) and by redesignating clauses (B) and (C) as clauses (1) and (2), respectively.

In The  
**Supreme Court of the United States**  
October Term, 1990

THOMAS CIPOLLONE, Individually and as Executor  
of the Estate of Rose D. Cipollone,

*Petitioner,*

vs.

LIGGETT GROUP, INC., a Delaware Corporation;  
PHILIP MORRIS INCORPORATED, a Virginia  
Corporation; and LOEW'S THEATRES, INC.,  
a New York Corporation,

*Respondents.*

On Writ Of Certiorari To The United States  
Court Of Appeals For The Third Circuit

AMICI CURIAE BRIEF OF THE STATES OF  
MINNESOTA, ALABAMA, ARIZONA, CONNECTICUT,  
IDAHO, MAINE, NEVADA, NEW JERSEY,  
NEW MEXICO, NORTH DAKOTA, OHIO AND  
WASHINGTON IN SUPPORT OF PETITIONER

HUBERT H. HUMPHREY, III  
Attorney General  
State of Minnesota

PETER M. ACKERBERG  
Special Assistant  
Attorney General  
Counsel of Record

525 Park Street, Suite 200  
St. Paul, MN 55103  
(612) 297-1083

*Attorneys for Amici Curiae  
States of Minnesota, Alabama,  
Arizona, Connecticut, Idaho,  
Maine, Nevada, New Jersey,  
New Mexico, North Dakota,  
Ohio and Washington*

[additional counsel listed on inside cover]



JAMES H. EVANS  
Attorney General of Alabama

GRANT WOODS  
Attorney General of Arizona

RICHARD BLUMENTHAL  
Attorney General of Connecticut

LARRY ECHOHAWK  
Attorney General of Idaho

MICHAEL E. CARPENTER  
Attorney General of Maine

FRANKIE SUE DEL PAPA  
Attorney General of Nevada

ROBERT J. DEL TUFO  
Attorney General of New Jersey

TOM UDALL  
Attorney General of New Mexico

NICHOLAS J. SPAETH  
Attorney General of North Dakota

LEE FISHER  
Attorney General of Ohio

KENNETH O. EIKENBERRY  
Attorney General of Washington

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In The  
**Supreme Court of the United States**

October Term, 1990

THOMAS CIPOLLONE, Individually and as Executor  
of the Estate of Rose D. Cipollone,

*Petitioner,*

vs.

LIGGETT GROUP, INC., a Delaware Corporation;  
PHILIP MORRIS INCORPORATED, a Virginia  
Corporation; and LOEW'S THEATRES, INC.,  
a New York Corporation,

*Respondents.*

On Writ Of Certiorari To The United States  
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AMICI CURIAE BRIEF OF THE STATES OF  
MINNESOTA, ALABAMA, ARIZONA, CONNECTICUT,  
IDAHO, MAINE, NEVADA, NEW JERSEY,  
NEW MEXICO, NORTH DAKOTA, OHIO AND  
WASHINGTON IN SUPPORT OF PETITIONER

INTEREST OF AMICI STATES

The amici states have a definite and substantial interest in retaining common law remedies to assist them in promoting the health and welfare of their citizens through the incentives which common law damage claims provide for manufacturers to act responsibly toward the consumers of their products. In addition, the

amici states have a definite and substantial interest in providing their citizens injured by cigarette smoking with common law remedies in state and federal courts to gain compensation for their injuries from manufacturer wrongdoers.<sup>1</sup>

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### SUMMARY OF ARGUMENT

The court below determined that the Federal Cigarette Labeling and Advertising Act (hereinafter "Act"), 15 U.S.C. §§ 1331-1341 (1982 and Supp. II 1984), impliedly preempts state common law actions premised on the inadequacy of a cigarette manufacturer's health warnings, the propriety of cigarette advertising practices, suppression of cigarette-related health information and intentional deception of consumers regarding the nature and extent of the health hazards of smoking. *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 581-82 (3d Cir. 1990) (*Cipollone III*). As a consequence, vital state functions advanced by state common law are greatly impaired. The salutary role of common law in helping to safeguard the health of citizens is vitiated by the *Cipollone III* preemption decision. Furthermore, the function of common law to provide injured citizens with compensation is significantly eroded.

The preemption decision of *Cipollone III* is based merely on Congressional silence with respect to any

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<sup>1</sup> This brief is filed on behalf of the amici states by their respective Attorneys General pursuant to Supreme Court Rule 37.5.

intent to preempt state common law actions. However, a preemption decision made on such a slender basis and with such major consequence to significant state interests undermines federalism and violates the separation of powers doctrine. Therefore, the judgment of the court below should be reversed.

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### ARGUMENT

#### I. THE *CIPOLLONE III* PREEMPTION DETERMINATION IMPAIRS SIGNIFICANT STATE FUNCTIONS.

*Cipollone III*'s preemption holding deprives the states of a traditional and significant mechanism to promote the health of their citizens and to compensate their citizens for harm caused by cigarette manufacturers. In *Cipollone III*, the Third Circuit reaffirmed its prior determination that

the Act preempts . . . state law damage actions relating to smoking and health that challenge either the adequacy of warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes. . . . [W]here the success of a state law damage claim necessarily depends on the assertion that a party bore the duty to provide a warning to consumers in addition to the warning Congress has required on cigarette packages, such claims are preempted as conflicting with the Act.

*Cipollone III*, 893 F.2d at 582 (quoting *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 187 (3d Cir. 1986) (*Cipollone II*), cert. denied 484 U.S. 976 (1987)). In upholding the district

court's interpretation of the scope of its prior preemption holding, the Third Circuit stated that the district court correctly barred

plaintiff's failure to warn, fraudulent misrepresentation, express warranty, and conspiracy to defraud claims to the extent that they sought to challenge the defendants' advertising, promotional, and public relations actions after January 1, 1966.

*Id.*<sup>2</sup>

An important function of state common law is to serve as a "prophylactic factor . . . preventing future harm . . . . When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm." *Prosser and Keeton on the Law of Torts*, § 4 at 25 (W. Keeton, 5th ed. 1984).

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<sup>2</sup> The preemption provision of the Federal Cigarette Labeling and Advertising Act ("Act") states:

(a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334 (1982).

The Third Circuit acknowledged that this provision of the Act does not "clearly encompass[ ] state common law." *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 185 (3d Cir. 1986).

The states are vitally interested in assuring the good health of their citizens generally and, specifically, in minimizing the harmful consequences of cigarette smoking. Each state has created a department of health or a division of another agency to protect and improve the health of citizens. See *The Council of State Governments*, 28 *The Book Of The States: 1990-91* at 479 (1990); see also Minn. Stat. § 144.05 (1990) (state health commissioner "responsible for the development and maintenance of an organized system of programs and services for protecting, maintaining, and improving the health of the citizens.").

Toward the end of minimizing the health hazards of cigarette smoking, most states have enacted one or more measures to restrict cigarette smoking.<sup>3</sup> These include restrictions on smoking in public or private places, restrictions on cigarette sales to minors, restrictions on distribution of cigarette samples, restrictions on sales of cigarettes in vending machines and licensing requirements for cigarette sales. See Tobacco-Free America Legislative Clearinghouse, *State Legislated Actions on Tobacco Issues* (1990); see also Minnesota Department of Health, *The Minnesota Tobacco-Use Prevention Initiative: 1987-1988*, at 3 (1989) ("Preventing the death, disease, economic loss, and disability that smoking exacts each year is a top public health priority in Minnesota.").

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<sup>3</sup> Missouri and Wyoming are the only states without restrictions on smoking or distribution of cigarettes, according to a recent compilation. Tobacco-Free America Legislative Clearinghouse, *State Legislated Actions on Tobacco Issues At-A-Glance* (1990).



The promotion of non-smoking is part of the states' primary and historic role, based on its police powers, of regulating for the health and safety of its citizens. See *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985) ("[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern."); *Barsky v. Board of Regents*, 347 U.S. 442, 449 (1954) ("[A] state has broad powers to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power.").

State common law, by providing for damage compensation claims, plays an important supplementary role in promoting the health of citizens because it encourages manufacturers to produce a safer product and design better consumer warnings regarding the dangers of cigarette smoking. See *Silkwood v. Kerr-McGee Corp., Inc.*, 464 U.S. 238, 263 (1984) (Blackmun, J., dissenting) ("[T]he prospect of compensating victims of nuclear accidents will affect a licensee's safety calculus. Compensatory damages therefore have an indirect impact on daily operations of a nuclear facility."). Thus, state common law is an additional tool, complementary to statutory enactments, to minimize the harmful health effects of cigarette smoking on their citizens.<sup>4</sup>

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<sup>4</sup> This indirect effect of a judgment under common law requiring a cigarette manufacturer to pay damages does not violate the Act's express preemption provision because it does not require the manufacturer to add any additional warning to a cigarette package and does not impose any requirement on the manufacturer with respect to advertising or promotion. A

(Continued on following page)

The sweeping preemption determination of *Cipollone III* substantially erodes the role of state common law in promoting citizens' health by prohibiting a number of potential common law claims against manufacturers. It, therefore, hampers the states in accomplishing the vital and traditional function, based on the police power, of protecting citizens' health.

The *Cipollone III* preemption decision also burdens the traditional state function, also based on the police power, of providing a mechanism for compensation of injured citizens. The primary purpose of a tort law action is to compensate a victim for damage suffered at the expense of the wrongdoer. *Prosser and Keeton on the Law of Torts*, § 2 at 7 (W. Keeton, 5th ed. 1984).

The historic function of providing tort remedies to injured citizens in its state courts is a central state function. Every state has a judicial system that devotes substantial resources to the adjudication of tort law claims. Determining which causes of action will be recognized is an aspect of the states' fundamental police power. *Fabricius v. Montgomery Elevator Co.*, 254 Iowa 1319, 1328, 121 N.W.2d 361, 366 (1963) ("power to deprive one of a common law action is vested in the legislature under its police power . . . ."); accord *Mays v. Liberty Mutual*

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(Continued from previous page)

damages action provides an incentive for a manufacturer to voluntarily take a variety of actions designed to encourage fuller consumer understanding, but it does not require them.

*Insurance Co.*, 323 F.2d 174, 178 (3d Cir. 1963).<sup>5</sup> Thus, "the Cipollones' tort action concerns rights and remedies traditionally defined solely by state law." *Cipollone II*, 789 F.2d at 186.

By preempting common law remedies, the Third Circuit's decision cuts deeply into the traditional state function of providing a mechanism for compensating injured citizens.

## II. PREEMPTION BASED ON CONGRESSIONAL SILENCE REGARDING ITS INTENT UNDERMINES FEDERALISM AND VIOLATES THE SEPARATION OF POWERS DOCTRINE.

The court below determined that particular common law actions against cigarette manufacturers are impliedly preempted on the basis of what most generously can be characterized as silence in the statute and legislative history. To find preemption of central state functions on such a slender basis undermines the principle of federalism that the states and the federal government are dual sovereigns and thrusts the courts into the legislative arena in violation of the separation of powers doctrine.

<sup>5</sup> Furthermore, a state tort law system "with its reliance on jury verdicts and its emphasis on public accountability has served as a deeply democratic symbol of a state's commitment to individualized justice." Wells, *Tort Law As Corrective Justice: A Pragmatic Justification For Jury Adjudication*, 88 Mich. L. Rev. 2348, 2349 (1990).

### A. Congress Did Not Clearly Intend To Preempt State Common Law Remedies.

This Court recently reaffirmed that "[p]re-emption fundamentally is a question of congressional intent . . . ." *English v. General Electric Co.*, \_\_\_ U.S. \_\_\_, \_\_\_, 110 S. Ct. 2270, 2275 (1990). Congress has often used explicit language to express its intent to preempt or not preempt state common law. See, e.g., 12 U.S.C. §§ 1715z-17(d) and 1715z-18(e) (1988) (certain insured mortgages not subject to specified common law limitations); 17 U.S.C. § 301(c) (1988) (no preemption of common law with respect to sound recording copyrights for specified time); 29 U.S.C. §§ 653(b)(4) (1988) (workman's compensation common law not preempted) 29 U.S.C. § 1144(a), (c)(1) (1988) (preempting common law regarding employee benefit plans). However, the express preemption provision of the Act does not preempt common law actions. *Cipollone II*, 789 F.2d at 185.

The Third Circuit found preemption in the absence of an explicit Congressional directive regarding preemption of common law remedies one way or the other.

Congress' statutory silence on the matter was accompanied by legislative history which, if it points in any direction, points to non-preemption. The congressional reports, debates and discussions regarding preemption are remarkable for their lack of clear intention to preempt common law actions. See *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1159-63 (D.N.J. 1984) (*Cipollone I*) (reviewing legislative history). The only discussions of

common law claims seem to assume the continued existence of common law actions against cigarette manufacturers. For example, Congressman Fascell commented that the Act "in no way affects the right to raise the defense of 'assumption or [sic] risk' and the legal requirement for such a defense to prevail." 111 Cong. Rec. 16,543-544 (July 13, 1965) (quoted in *Cipollone I*, 593 F. Supp. at 1162). As *Cipollone I* observed, "all parties assumed the existence of lawsuits such as the instant one." 593 F. Supp. at 1163. Thus, Congress' preemptive intent is marked by statutory silence and no support in the legislative history.

The absence of evidence that Congress intended to preempt is also evident from the number of courts that have concluded that Congress did not intend to preempt state common law actions. *Cipollone I*, 593 F. Supp. at 1170, *rev'd*, *Cipollone II*, 789 F.2d 181; *Palmer v. Liggett Group, Inc.*, 633 F. Supp. 1171 (D. Mass. 1986), *rev'd*, 825 F.2d 620 (1st Cir. 1987); *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 577 A.2d 1239 (1990). *Carlisle v. Philip Morris, Inc.*, 805 S.W.2d 498 (Tex. Ct. App. 1991).

#### **B. Preemption Of Common Law Claims Against Cigarette Manufacturers Undermines Federalism And Violates The Separation Of Powers Doctrine.**

The "basic assumption that congress did not intend to displace state law," *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981), is an especially strong presumption when Congress legislates "in a field which the States have traditionally occupied . . . unless that was the *clear and manifest purpose* of Congress." *Rice v. Santa Fe Elevator*

*Corp.*, 331 U.S. 218, 230 (1947) (emphasis added). See also *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47 (1963) (court "not to conclude that Congress legislated the ouster of [a state statute] . . . in the absence of an *unambiguous congressional mandate* to that effect.") (emphasis added).

The non-preemption presumption reflects the Court's sensitivity to concerns regarding federalism. In various contexts, this Court has insisted on clarity of Congressional intent as a precondition of expanding federal power at the expense of important state interests. Thus, for example, "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985). Therefore, Congress must make its intention to abrogate the states' Eleventh Amendment immunity "unmistakably clear." *Id.* at 242.

In the context of reviewing state taxation power, the Court has stated that " 'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance.' " *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275, 281-82 (1972) (citation omitted). In the context of state authority to regulate sales to the Federal Government, the Court has stated:

An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous.



*Penn Dairies, Inc. v. Milk Control Comm'n*, 318 U.S. 261, 275 (1943).

In deciding preemption issues:

Our analysis of this problem must be guided by respect for the separate spheres of governmental authority preserved in our federalist system. Although the Supremacy Clause invalidates state laws that "interfere with, or are contrary to the laws of Congress . . . & the "exercise of federal supremacy is not lightly to be presumed," . . . . As we recently reiterated, "[p]reemption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons - either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.

*Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981) (citations omitted). Thus, the Court repeatedly interprets Congressional intent regarding preemption

with the "presumption against finding preemption of state law in areas traditionally regulated by the States" and "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

*California v. Federal Energy Regulatory Commission*, \_\_\_ U.S. \_\_\_, 110 S. Ct. 2024, 2029 (1990) (citations omitted). In other words, "courts may not find state measures preempted in the absence of clear evidence that Congress so intended . . . ." *Id.* Furthermore, courts "must . . . give full effect to evidence that Congress considered and sought to preserve the States' coordinate regulatory role in our federal scheme." *Id.*

Here, clear evidence that Congress intended to preempt any common law claims against cigarette manufacturers is absent. Furthermore, there is evidence that Congress envisaged the continuation of common law claims against cigarette manufacturers by consumers after passage of the Act. See p.9-10, *supra*. This possibility did not disturb Congress. It did nothing to prevent continued common law claims, as it has done in other areas, by expressly preempting such claims.

Nor did Congress impliedly preempt common law claims. Nothing in the Act establishes a "structure and purpose," *FMC Corp. v. Holliday*, \_\_\_ U.S. \_\_\_, 111 S. Ct. 403, 407 (1990), from which such an intent can be fairly implied. The two expressed purposes of the Act are (1) to adequately inform the public of adverse health effects of smoking and (2) to not impede commerce and the national economy with diverse, nonuniform and confusing cigarette labeling and advertising regulations. 15 U.S.C. § 1331(1) and (2) (1982 and Supp. 1984). Neither purpose is thwarted by the common law damages claims found to be preempted by the court below.

The provision of adequate health information is in no way impeded by the possibility that a manufacturer, spurred by a common-law damage claim, may choose to advise consumers of health hazards beyond the advice mandated by Congress. Furthermore, manufacturers are not required by common-law damages to comply with diverse, nonuniform or confusing labeling and advertising regulations. A common-law damage claim, if successful, provides an *incentive* to change behavior in a variety of ways but it does not *require* any behavior change other than paying a money judgment.

Divining a Congressional intent to preempt common law claims from what can most generously be described as Congressional silence fails to establish a sound basis for trammelling traditional state interests in providing opportunities for health regulation and compensation for injured citizens through common law actions. Therefore, "[a]ny indulgence in construction should be in favor of the states, because Congress can speak with drastic clarity whenever it chooses to assume full federal authority, completely displacing the states." *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 780 (1947) (Frankfurter, J., separate opinion).

Reversal of the *Cipollone III* preemption determination is also required by the separation of powers doctrine. It is not the courts' role to make legislative choices where the legislature declines to make choices. See *United States v. Locke*, 471 U.S. 84, 95 (1985) ("the fact that Congress might have acted with greater clarity or foresight does not give courts *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do."). Yet, in light of Congressional silence on the subject, that is exactly what would drive, or appear to do so, a conclusion by this Court that Congress intended to preempt common law claims.

This Court has shunned "judicially created limitations on federal power" to protect the states from federal inroads on vital state interests. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 552 (1985). Instead, the states are "more properly protected by procedural safeguards inherent in the structure of the federal system . . . ." *Id.* The court should similarly eschew judicially created expansion of federal power that trammels vital state interests. In this case, the federal system effectively protected the states by enacting

a regulatory scheme that preserves traditional state common law remedies to help protect health and provide compensation for injuries. A judicially created expansion of federal power at the state's expense, based on no more than silence or, at best, a very ambiguous expression of legislative intent, is an unjustified judicial intervention into the legislative arena.

---

## CONCLUSION

For all the foregoing reasons, the Court should reverse the court below and hold that the Federal Cigarette Labeling and Advertising Act does not preempt state common law actions.

Dated: May 23, 1991.

Respectfully submitted,  
HUBERT H. HUMPHREY, III  
Attorney General  
State of Minnesota

PETER M. ACKERBERG  
Special Assistant  
Attorney General  
Counsel of Record

525 Park Street, Suite 200  
St. Paul, MN 55103  
(612) 297-1083

*Attorneys for Amici Curiae  
States of Minnesota, Alabama,  
Arizona, Connecticut, Idaho,  
Maine, Nevada, New Jersey,  
New Mexico, North Dakota,  
Ohio and Washington*

[Other Counsel Listed On Inside Front Cover]

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

THOMAS CIPOLLONE, Individually and as Executor  
of the Estate of Rose D. Cipollone,  
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On Writ of Certiorari to the  
United States Court of Appeals  
for the Third Circuit

BRIEF OF  
AMERICAN COLLEGE OF CHEST PHYSICIANS  
AS AMICUS CURIAE IN SUPPORT OF PETITIONER

RAYMOND D. COTTON \*  
SHERMAN S. POLAND  
MICHAEL M. GABA  
ROSS MARSH FOSTER MYERS  
& QUIGGLE  
888 Sixteenth Street, N.W.  
Washington, D.C. 20006  
(202) 822-8888  
*Attorneys for American College  
of Chest Physicians*

May 23, 1991

\* Counsel of Record



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

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No. 90-1038

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THOMAS CIPOLLONE, Individually and as Executor  
of the Estate of Rose D. Cipollone,  
*Petitioner,*  
v.

LIGGETT GROUP, INC.,  
A Delaware Corporation;  
PHILIP MORRIS, INC.,  
A Virginia Corporation; and  
LOEW'S THEATRES, INC.,  
A New York Corporation,  
*Respondents.*

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On Writ of Certiorari to the  
United States Court of Appeals  
for the Third Circuit

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**BRIEF OF  
AMERICAN COLLEGE OF CHEST PHYSICIANS  
AS AMICUS CURIAE IN SUPPORT OF PETITIONER**

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The American College of Chest Physicians, pursuant to Rule 37 of this Court, submits this brief amicus curiae in support of Petitioner, Thomas Cipollone, Individually and as Executor of the Estate of Rose D. Cipollone, to reverse the judgment of the Court of Appeals for the Third Circuit and remand the case for reconsideration. The American College of Chest Physicians has received the consent of all parties to file this brief as amicus curiae, and letters of consent have been filed concurrently with this brief.



### INTEREST OF THE AMICUS CURIAE \*

The petitions in this case raise questions of national importance. Couched in legal parlance they involve preemption issues, namely whether the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1340 (1982 & Supp. II 1984) ("Labeling Act") constitutes a shield for tobacco companies, absolving them of liability either for failure to provide adequate warnings of the health hazards resulting from smoking or for suppression of health related information and intentional deception of consumers. Given the overwhelming nature of the medical evidence and in particular the powerful addictive aspects of nicotine, we do not believe that the Labeling Act can implicitly preempt state tort claims.

In their briefs, Petitioner and the Amici, the American Cancer Society, *et al.*, analyze the legal aspects of these preemption issues. It is not our purpose to repeat those arguments. We believe, however, that a decision whether the Labeling Act implicitly preempted intentional tort action under state law cannot be divorced from its context of medical evidence both as to the dangers of smoking to health and of the powerful addictive nature of nicotine in tobacco smoke. Issues involving failure to warn, suppression of information, and intentional decep-

\* Counsel to the American College of Chest Physicians consulted extensively with its President, Alex G. Little, III, M.D., FCCP, Professor and Chairman, Department of Surgery, University of Nevada School of Medicine; its Executive Director, Alfred Soffer, M.D., FCCP, Editor-in-Chief of *Chest* and Professor of Medicine, University of Chicago; Robert S. Fontana, M.D., FCCP, Professor Emeritus of Medicine, Mayo Medical School and Consultant in Internal Medicine, Division of Thoracic Diseases, Mayo Clinic; Douglas R. Gracey, M.D., FCCP, Professor and Vice-Chairman, Department of Medicine, Mayo Clinic; Richard D. Hurt, M.D., FACP, Associate Professor of Medicine, Mayo Medical School, Chair, Division of Community Internal Medicine, Director, Mayo Nicotine Dependence Center; and Thomas E. Kottke, M.D., FACC, Consultant, Associate Professor of Medicine, Mayo Clinic, for their medical expertise and information contained in this amicus curiae brief.

tion all relate to the widely accepted state of medical evidence and cannot be answered without a recognition of that knowledge. Consequently, this brief will be directed principally toward a review of medical evidence of the adverse health effects of smoking from the early 1920s to the publication of the comprehensive Surgeon General's Report of 1964<sup>1</sup> and extending through the 1970s and 1980s during which an overwhelming body of medical data accumulated, including the addictive nature of tobacco smoke, and was synthesized in numerous Surgeon General Reports.<sup>2</sup> This overwhelming medical evidence demonstrates that it would be unreasonable to conclude that a statute regulating the size and location of warning labels, and which provided no alternative remedy or relief for persons whose health is adversely affected by tobacco smoke, contained an implicit preemption of remedies available under state law. The fact that the Labeling Act has been amended twice since 1966 without expressly exempting actions under state law, or providing alternative relief, strengthens the conclusion that there can be no implied preemption.

### Identity of the Amicus

The American College of Chest Physicians ("ACCP"), founded in 1935 as a medical and scientific society, is dedicated to providing postgraduate medical education for physicians involved in the diagnosis and treatment of

<sup>1</sup> U.S. Dep't of Health and Human Services, *Reducing the Health Consequences of Smoking: 25 Years of Progress—A Report of the Surgeon General* (1989) [hereinafter *1989 Surgeon General's Report*] (citing U.S. Public Health Service, *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service* (1964)).

<sup>2</sup> See, e.g., U.S. Dep't of Health and Human Services, *The Health Consequences of Smoking: Nicotine Addiction—A Report of the Surgeon General* (1988) [hereinafter *1988 Surgeon General's Report*]; *1989 Surgeon General's Report*, *supra* note 1; U.S. Dep't of Health and Human Services, *The Health Benefits of Smoking Cessation—A Report of the Surgeon General* (1990) [hereinafter *1990 Surgeon General's Report*].

chest diseases, including those long-term debilitating cardiopulmonary diseases induced or exacerbated by inhalation of tobacco smoke, *e.g.*, lung cancer, emphysema, coronary artery disease, arteriosclerosis obliterans affecting the lower extremities, bronchitis, and asthma. Requirements for membership in ACCP include certification by an American or Canadian Board, or an international equivalent, as well as certification by one of the subspecialty boards related to cardiopulmonary disease. Additionally, a minimum of eighteen months of training or experience in a chosen subspecialty is required. Fellows of the ACCP must be in good standing in their community and be proposed for membership by other Fellows. Specialties represented by members are pulmonary disease, cardiology, cardiothoracic surgery, critical care medicine, infectious disease, allergy, and related specialties. Approximately 13,000 members practice medicine and surgery in the United States and Canada, and another 1,800 members practice in ninety countries worldwide. Members of the ACCP are professionally involved with the adverse effects of smoking, treating those patients who suffer from heart and lung disease on a daily basis. Every Fellow of the ACCP during the last ten years has pledged to promote the cessation of smoking among his or her patients (see Appendix). This pledge reflects the ACCP's sincere goal to reduce or prevent cardiopulmonary disease.

As physicians, we confront, on a daily basis, debilitating disease and death that result from inhalation of tobacco smoke. With approximately 390,000 deaths annually<sup>3</sup> attributable to the effects of smoking, smoking diseases, such as lung cancer, emphysema, and coronary artery disease, and other cardiopulmonary diseases have become a major social problem of transcending importance.

The concern of the Amicus is magnified by the fact that tobacco smoke contains a powerful addictive drug,

<sup>3</sup> 1990 Surgeon General's Report, *supra* note 2, at v.

nicotine. Because of this highly addictive substance, many individuals find it exceptionally difficult to discontinue smoking even when their personal physicians advise them of the dangers to their health, or when they are made aware of printed warning notices on cigarette packages.

Medical science has made giant strides in eliminating some diseases that have afflicted populations in the United States and throughout the world. The ACCP continues to seek new and improved treatments and procedures (including surgery) to ameliorate the effects of diseases resulting from inhalation of tobacco smoke. But, unlike other diseases which medical science has conquered or substantially reduced, elimination or control of smoking diseases may be thwarted by nicotine addiction that renders normal precautionary advice and warnings ineffective.

Although this case raises important questions of federalism and possible preemption of intentional torts arising under state law, the broad medical and social context should not be ignored. The ACCP respectfully urges this Court to consider the medical, historical context and, in particular, the powerful addictive nature of tobacco smoke in its deliberation over the nationally important issues presented by this case.

The opinion of the Court below notes that Rose Cipollone smoked cigarettes, contracted lung cancer as a direct result of her smoking, and subsequently died from lung cancer.<sup>4</sup> Her illness and death occurred during a time in medical history when a great deal of medical evidence concerning the health hazards of smoking became known. We believe that this Court should consider the medical context of Rose Cipollone's death, and in particular, what information was known to the medical profession and increasingly available to the public both prior to and sub-

<sup>4</sup> *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 551 (3d Cir. 1991), *cert. granted*, 111 S.Ct. 1386 (1991).



sequent to the effectiveness of the Federal Cigarette Labeling and Advertising Act on January 1, 1966.

To resolve the questions presented it is imperative that the Court take into consideration the volumes of medical data regarding the health hazards of smoking, for without such evidence there would be no preemption issue to decide. More precisely, if little or no medical evidence of the health hazards of smoking had existed, the foundation for actions based upon failure to warn, suppression of information, and intentional deception would have been undermined. Conversely, the pervasive and overwhelming nature of such medical knowledge that did exist lends strong support for such actions under state law. As physicians, we believe that this case involves more than a legal exercise in federalism. The Court should not ignore the real world impact of its decision upon the health of persons throughout the nation.

#### SUMMARY OF ARGUMENT

Early, reputable scientific studies concerning the adverse health effects of smoking were conducted in the 1920s and 1930s. Medical evidence concerning the physical harms resulting from smoking continued to accumulate, and in 1964 the first Surgeon General's Report stated that the medical community had concluded that smoking has a "causal relationship" to various diseases rather than just a "significant association". Since 1964, medical evidence has steadily expanded to recognize the causal connection between smoking and lung cancer, tongue cancer, lip cancer, cardiovascular disease and chronic obstructive lung disease.<sup>5</sup> In 1986, the Surgeon General reported that non-smokers who inhale second-hand or passive smoke from smokers suffer from the same heart and lung diseases as smokers.<sup>6</sup> By 1988, the

<sup>5</sup> 1989 Surgeon General's Report, *supra* note 1, at 5-10.

<sup>6</sup> 1989 Surgeon General's Report, *supra* note 1, at 10 (citing U.S. Dep't of Health and Human Services, *The Health Consequences of Involuntary Smoking—A Report of the Surgeon General* (1986a)).

Surgeon General acknowledged what we physicians have known for years: nicotine is addictive. The accumulated medical evidence has not been refuted and cannot be refuted.

The totality of the medical evidence compels the medical conclusion that the warning labels prescribed by the Labeling Act never did and still do not adequately warn the public about the medical realities of smoking.<sup>7</sup> In fact, given the addictive nature of nicotine in cigarettes, the warning labels *per se cannot* adequately warn consumers. A warning label implies the consumer has a choice. A smoking consumer, however, is deprived of any real choice. That person is robbed of choice with the onset of addiction. The preponderance of medical evidence mandates that the Labeling Act cannot implicitly preempt state tort claims.

#### ARGUMENT

##### THE DECISION OF THE COURT OF APPEALS SHOULD BE REVERSED ON THE PREEMPTION ISSUES

###### A. The Early Years: 1920-1957

The medical community, through extensive scientific research and testing, began to recognize the link between tobacco and carcinomas as early as 1920, five years before Rose Cipollone was born. In that year, the Journal of the American Medical Association published scientific survey results of A. C. Broders, linking tobacco use to

<sup>7</sup> We take no position as to whether the Labeling Act should be considered sufficient to preempt state labeling requirements or similar requirements imposed by federal agencies, such as the Federal Trade Commission. We do note, however, that it is apparent that the Labeling Act made no attempt to provide Rose Cipollone, or other similarly situated patients, with any alternative remedy to take the place of the relief she sought under state law. *Saul v. United States*, 928 F.2d 829 (9th Cir. 1991).



lip cancer.<sup>8</sup> Broders' effort was corroborated in 1928, when the New England Journal of Medicine published H. L. Lombard's and C. R. Doering's extensive survey results which found a significant incidence of cancer among heavy smokers.<sup>9</sup> Ten years later, R. Pearl in a study reported in Science, concluded that heavy smokers had a shorter life expectancy than non-smokers.<sup>10</sup> By 1941, one year before Rose Cipollone began smoking at the age of 17, A. Ochsner and M. DeBakey concluded, as reported in the Archives of Surgery, that the epidemic rise of carcinoma of the lung was linked to smoking. The authors concluded:

It is our definite conviction that the increase in the incidence of pulmonary carcinoma is due largely to the increase in smoking, particularly cigarette smoking, which is universally associated with inhalation.

A. Ochsner & M. DeBakey, *Carcinoma of the Lung*, 42 Archives of Surgery 209, 221 (1941).

In 1950, E. Wynder and E. Graham published their epidemiologic study of 684 cases in the Journal of the American Medical Association, which determined that a strong link existed between tobacco smoke and bronchiogenic carcinoma.<sup>11</sup> By 1954, E. Wynder completed and

<sup>8</sup> 1989 Surgeon General's Report, *supra* note 1, at 5 (citing A.C. Broders, *Squamous-cell Epithelioma of the Lip. A Study of Five Hundred and Thirty Seven Cases*, 74 Journal of the American Medical Association 656 (1920)).

<sup>9</sup> 1989 Surgeon General's Report, *supra* note 1, at 5 (citing H.L. Lombard & C.R. Doering, *Cancer Studies in Massachusetts. 2. Habits, Characteristics and Environment of Individuals With and Without Cancer*, 198 New England Journal of Medicine 481 (1928)).

<sup>10</sup> 1989 Surgeon General's Report, *supra* note 1, at 5 (citing R. Pearl, *Tobacco Smoking and Longevity*, 87 Science 216 (1938)).

<sup>11</sup> 1989 Surgeon General's Report, *supra* note 1, at 5 (citing E. Wynder & E. Graham, *Tobacco Smoking as a Possible Etiologic Factor in Bronchiogenic Carcinoma: A Study of 684 Proved Cases*, 143 Journal of the American Medical Association 329 (1950)).

published his own study entitled, "Tobacco As a Cause of Lung Cancer" in which he found definitive proof that tobacco may act as a carcinogen to the human bronchial epithelium, and that a cancer develops in proportion to exposure to a given agent.<sup>12</sup> At the same time Dr. Wynder was publishing his results in 1954, his British colleagues R. Doll and A. B. Hill, were confirming his 1950 conclusions through a prospective mortality study.<sup>13</sup> By 1958, Americans, E. C. Hammond and D. Horn, re-confirmed these earlier results by studying the causes of death of more than 187,000 men over a 44-month period.<sup>14</sup>

The mid to late 1950s proved to be a turning point in our understanding of the relationship between tobacco smoke and cancer. During the 1930s, 1940s, and early 1950s, the medical evidence mounted, as reflected by the above-cited studies, that there was a significant association between tobacco smoke and various cancers—without yet reaching the conclusion that tobacco *causes* cancer. Dr. Wynder's 1954 findings can be viewed as one of the first major steps towards revealing the causal link between inhalation of tobacco smoke and cancer. While

<sup>12</sup> E. Wynder, *Tobacco and Health: A Review of the History and Suggestions for Public Health Policy*, 103 Public Health Reports 8, at 10 (1988) (citing E. Wynder, *Tobacco As a Cause of Lung Cancer: With Special Reference to the Infrequency of Lung Cancer Among Nonsmokers*, 57 Pennsylvania Medical Journal 1073 (1954)). The Surgeon General has recognized that tobacco smoke contains at least 43 known carcinogens. 1989 Surgeon General's Report, *supra* note 1, at 12.

<sup>13</sup> 1989 Surgeon General's Report, *supra* note 1, at 5 (citing R. Doll & A.B. Hill, *The Mortality of Doctors in Relation to Their Smoking Habits: A Preliminary Report*, 1 British Medical Journal 1451 (1954)).

<sup>14</sup> 1989 Surgeon General's Report, *supra* note 1, at 5 (citing E.C. Hammond & D. Horn, *Smoking and Death Rates—Report on Forty-four Months of Follow-up on 187,783 Men. I. Total Mortality*, 166 Journal of the American Medical Association 1159 (1958a)).

the medical research community had clearly linked smoking to cancer by the time Rose Cipollone began smoking in 1942, twelve years passed and Rose Cipollone was well into her nicotine addiction<sup>15</sup> when the causal connection between smoking and cancer was confirmed.

The watershed medical study finding the causal link between smoking and lung cancer was completed by the Study Group on Smoking and Health and was published in June 1957.<sup>16</sup> The Study Group was organized in June 1956 under the sponsorship of the American Cancer Society, the American Heart Association, and the National Cancer and National Heart Institutes at the National Institutes of Health. The distinguished seven-member panel, chaired by Frank M. Strong, University of Wisconsin, Madison, held six 2-day conferences, during which time they examined the most pertinent literature and the most recent unpublished material to determine the effects of tobacco smoking on health and to recommend further needed research.<sup>17</sup>

The Study Group's 1957 Report on the issue of lung cancer states in pertinent part:

At least 16 independent studies carried on in five countries during the past 18 years have shown that there is a statistical association between smoking and the occurrence of lung cancer . . . . These retrospective studies have been reinforced by two investigations in which large male populations have been followed prospectively. Lung cancer occurs much more frequently (5 to 15 times) among cigarette smokers than among nonsmokers, and there is a direct relationship between the incidence of lung cancer and the amount smoked. It is estimated that on a lifetime basis, one of every ten men who smoke

<sup>15</sup> The addictive nature of nicotine is discussed below at Part D.

<sup>16</sup> Study Group on Smoking and Health, *Smoking and Health*, 125 Science 1129 (1957).

<sup>17</sup> *Id.*

more than two packs a day will die of lung cancer. The comparable risk among nonsmokers is estimated at one out of 275 . . . .

\* \* \* \*

The sum total of scientific evidence establishes beyond reasonable doubt that cigarette smoking is a causative factor in the rapidly increasing incidence of human epidermoid carcinoma of the lung.

Study Group on Smoking and Health, *Smoking and Health*, 125 Science 1129 (1957).

Despite all of the medical evidence that accumulated during the 1950s, culminating in this 1957 *retrospective* of existing studies, the record below contains evidence of advertising by the tobacco companies during the 1950s that not only failed to alert the public about the dangers of smoking, but asserted that smoking cigarettes was safe and harmless.<sup>18</sup> From a medical perspective, the position of the tobacco industry seems incomprehensible.

While we recognize the fact that the Labeling Act did not go into effect until 1966, truthfulness, fairness, and plain human decency dictate that the tobacco companies should disclose fully all of the medical facts available to smokers as well as to non-smokers exposed to passive smoke. As the Court is aware, the District Court in New Jersey held and the United States Court of Appeals for the Third Circuit affirmed that the tobacco companies failed to warn Rose Cipollone of the harms of smoking prior to the effective date of the Labeling Act.<sup>19</sup>

#### B. The Great Medical Advance: 1957-1964

Leading up to the release of the Surgeon General's landmark Advisory Committee on Smoking and Health Report in January 1964, there were two significant medical studies completed in Great Britain. Because of the

<sup>18</sup> *Cipollone v. Liggett Group, Inc.*, 893 F.2d at 548-550.

<sup>19</sup> *Id.*



increase in the incidence of chronic diseases around the world, the British (and others) began to look more closely at the relationship between tobacco smoking and disease. In 1957, the British Medical Research Council determined that a significant factor in the rise in lung cancer was attributable to smoking.<sup>20</sup> By 1962, the Royal College of Physicians declared:

Cigarette smoking is the most likely cause of the recent world-wide increase in deaths from lung cancer . . . is an important predisposing cause of the development of chronic bronchitis . . . probably increases the risk of dying from coronary heart disease . . . has an adverse effect on healing of [gastric and duodenal] ulcers . . . [and] may be a contributing factor in cancer of the mouth, pharynx, oesophagus, and bladder.

*1989 Surgeon General's Report, supra note 1, at 6 (quoting Royal College of Physicians, Smoking and Health: Summary and Report of the Royal College of Physicians of London on Smoking in Relation to Cancer of the Lung and Other Diseases (1962)).*

In the United States, at the urging of the American Cancer Society, the American Public Health Association, the American Heart Association and the National Tuberculosis Association (now known as the American Lung Association), President John F. Kennedy formed the Surgeon General's Advisory Committee on Smoking and Health.<sup>21</sup> The Advisory Committee met nine times between November 1962 and December 1963. During this

<sup>20</sup> British Medical Research Council, *Tobacco Smoking and Cancer of the Lung. Statement by the Medical Research Council*, 1 British Medical Journal 1523 (1957).

<sup>21</sup> More specifically, the American College of Chest Physicians, along with other select medical and health-related organizations, tobacco industry representatives and Executive Branch representatives consulted with the Surgeon General and assisted in the selection of the distinguished 10-member panel.

time, it reviewed all of the available data from a wide range of studies: over 7,000 studies pertaining to smoking and health, more than 3,000 of which had been published after 1950.<sup>22</sup>

The major conclusion of the Surgeon General's first report in 1964, which set in motion the ultimate passage of the Federal Cigarette Labeling and Advertising Act of 1965, was:

Cigarette smoking is causally related to lung cancer in men; the magnitude of the effect of cigarette smoking far outweighs all other factors. The data for women, though less extensive, point in the same direction . . . . The risk of developing lung cancer increases with duration of smoking . . . . Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action.

*1989 Surgeon General's Report, supra note 1, at 7 (quoting U.S. Public Health Service, Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service (1964)).*

### C. A Survey: Post 1964-Present

Since the Surgeon General's first report was issued in 1964, 20 Surgeon General reports have followed, each one bringing to light new information about tobacco and the health hazards associated with smoking. One year after the Labeling Act went into effect, the Surgeon General's second report, issued in 1967, confirmed and strengthened the 1964 Report, stating, "The case for cigarette smoking as the principal cause of lung cancer is overwhelming . . . . [the evidence] strongly suggests

<sup>22</sup> *1989 Surgeon General's Report, supra note 1, at 6 (citing U.S. Public Health Service, Report of the Advisory Committee to the Surgeon General of the Public Health Service (1964)).*



that cigarette smoking can cause death from coronary heart disease.”<sup>23</sup>

The 1968 Surgeon General's Report addressed the loss of life expectancy issue, defining “heavy” smokers as those smoking more than two packs per day and “light” smokers as those smoking less than half a pack per day. Among young men, heavy smokers were estimated to lose 8 years of their lives and light smokers were estimated to lose 4 years of their lives.<sup>24</sup> In 1969, the Surgeon General focused on the health effects of smoking on women. At that time, the Surgeon General was able to confirm an association between maternal smoking and infant low birthweight, as well as an increased incidence of prematurity, spontaneous abortion, stillbirth, and neonatal death.<sup>25</sup>

By 1972, the Surgeon General identified nicotine, carbon monoxide, and tar as constituents most likely to produce health hazards of smoking.<sup>26</sup> And in 1975 the Surgeon General turned his attention to second-hand or passive smoke, noting a linkage of parental smoking to bronchitis and pneumonia in children during their first year of life.<sup>27</sup> With “low tar” and “low nicotine” ciga-

<sup>23</sup> 1989 Surgeon General's Report, *supra* note 1, at 8 (quoting U.S. Public Health Service, *The Health Consequences of Smoking: A Public Health Service Review: 1967* (1968a)).

<sup>24</sup> 1989 Surgeon General's Report, *supra* note 1, at 8 (citing U.S. Public Health Service, *The Health Consequences of Smoking: 1968 Supplement to the 1967 Public Health Service Review* (1968b)).

<sup>25</sup> 1989 Surgeon General's Report, *supra* note 1, at 8 (citing U.S. Public Health Service, *The Health Consequences of Smoking: 1969 Supplement to the 1967 Public Health Service Review* (1969)).

<sup>26</sup> 1989 Surgeon General's Report, *supra* note 1, at 8 (citing U.S. Dep't of Health, Education, and Welfare, *The Health Consequences of Smoking: A Report of the Surgeon General* (1972)).

<sup>27</sup> 1989 Surgeon General's Report, *supra* note 1, at 9 (citing U.S. Dep't of Health, Education, and Welfare, *The Health Consequences of Smoking* (1975)).

rettes hitting the marketplace, the Surgeon General focused his efforts in 1981 to the “changing cigarette” and concluded that there is no safe cigarette.<sup>28</sup> The 1983 Surgeon General's Report focused on the relationship of smoking and cardiovascular disease, concluding that cigarette smoking is one of three major independent causes of coronary heart disease.<sup>29</sup> The 1984 Surgeon General's Report focused on chronic obstructive lung disease, concluding that smoking is a major cause of that disease, accounting for between 80 and 90 percent of all chronic obstructive lung disease deaths in the United States.<sup>30</sup> As the Court is well aware, the decision below states that Rose Cipollone died in 1984 of lung cancer caused by smoking.<sup>31</sup>

#### D. Nicotine is Addictive

The Court below noted that if the jury believes that Liggett's (the cigarette company) pre-1966 conduct proximately caused Mrs. Cipollone to smoke cigarettes and thereby become addicted,

then those post-1965 cigarettes smoked as a result of the addiction should be considered in discerning whether Liggett's conduct proximately caused Mrs. Cipollone's lung cancer. The Surgeon General has recently concluded that “[s]cientists in the field of

<sup>28</sup> 1989 Surgeon General's Report, *supra* note 1, at 9 (citing U.S. Dep't of Health and Human Services, *The Health Consequences of Smoking: The Changing Cigarette—A Report of the Surgeon General* (1981)).

<sup>29</sup> 1989 Surgeon General's Report, *supra* note 1, at 9 (citing U.S. Dep't of Health and Human Services, *The Health Consequences of Smoking: Cardiovascular Disease—A Report of the Surgeon General* (1983)).

<sup>30</sup> 1989 Surgeon General's Report, *supra* note 1, at 10 (citing U.S. Dep't of Health and Human Services, *The Health Consequences of Smoking: Chronic Obstructive Lung Disease—A Report of the Surgeon General* (1984)).

<sup>31</sup> *Cipollone*, 893 F.2d at 551.

drug addiction now agree that nicotine, the principal pharmacological agent that is common to all forms of tobacco, is a powerfully addicting drug." U.S. Dep't Health & Human Serv., *The Health Consequences of Smoking: Nicotine Addiction—A Report of the Surgeon General* (1988).

*Cipollone v. Liggett Group, Inc.*, 893 F.2d at 563.

To understand the fact that nicotine is addictive, it is useful first to define the term "addiction". *Dorland's Pocket Medical Dictionary* defines "addiction" as, "physiologic or psychologic dependence on some agent (e.g., alcohol, drug), with a tendency to increase its use."<sup>32</sup> While the Surgeon General's 1988 Report, entitled "Nicotine Addiction," is considered by many experts as the single most authoritative document on the issue, this fact should not be confused with the fact that years ago authoritative medical studies identified nicotine as the active agent in tobacco causing its compulsive use. In 1942, for example, the year Rose Cipollone began smoking, L. M. Johnston equated smoking tobacco as a way to obtain nicotine with smoking opium as a way to obtain morphine.<sup>33</sup> If the analogy seems strained given the illegality of the use of opium, the legal classification should not cloud the medical reality. Pharmacologically, nicotine enters the blood stream rapidly from the lungs and is distributed to the brain, which then affects the central nervous system. More particularly, nicotine acts on specific binding sites or receptors throughout the nervous system, causing electrocortical activity, skeletal muscle relaxation, as well as cardiovascular and endocrine effects, which may act in concert to reinforce tobacco use.<sup>34</sup>

<sup>32</sup> *Dorland's Pocket Medical Dictionary* 13 (21st ed. 1968).

<sup>33</sup> 1988 *Surgeon General's Report*, *supra* note 2, at 10 (citing L.M. Johnston, *Tobacco Smoking and Nicotine*, 2 *Lancet* 742 (1942)).

<sup>34</sup> 1988 *Surgeon General's Report*, *supra* note 2, at 13-14.

The legality—or social acceptability—of a drug is not a criterion for determining whether it is addictive in nature. In fact, the Surgeon General's 1988 Report analogizes nicotine to heroin and cocaine, stating in part, "The pharmacologic and behavioral processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine."<sup>35</sup> Medically speaking, the drug dependence analysis applies equally in both situations. The following criteria, used to determine drug dependence, were summarized by the Surgeon General, who relied on significant input from the World Health Organization, the National Institute on Drug Addiction, and the American Psychiatric Association:

#### Primary Criteria of Drug Addiction

- Highly controlled or compulsive use;
- Psychoactive effects;
- Drug-reinforced behavior;

#### Additional Criteria

- Addictive behavior often involves:
  - stereotypic patterns of use;
  - use despite harmful effects;
  - relapse following abstinence;
  - recurrent drug cravings;
- Dependence-producing drugs often produce:
  - tolerance;
  - physical dependence;
  - pleasant (euphoriant) effects.

1988 *Surgeon General's Report*, *supra* note 2, at 7.

A significant amount of medical data demonstrates that smoking cigarettes is not a random exercise that smokers embark upon at their choosing. According to the American Psychiatric Association, it is possible for a smoker to

<sup>35</sup> 1988 *Surgeon General's Report*, *supra* note 2, at 9.



become nicotine dependent, *i.e.*, addicted to nicotine, if that person smokes continually for at least one month and exhibits at least one of the following diagnostic criteria:

1. serious attempts to stop or significantly reduce the amount of tobacco use on a permanent basis are unsuccessful;
2. attempts to stop smoking lead to the development of Tobacco Withdrawal;
3. the individual continues to use tobacco despite a serious physical disorder, *e.g.*, respiratory or cardiovascular disease, that he or she knows is exacerbated by tobacco use.

American Psychiatric Association, *Diagnostic and Statistical Manual*, 178 (3d ed. 1987).

Tobacco Withdrawal, a medical term of art defined by the American Psychiatric Association, usually occurs within 24 hours of a smoker's abrupt cessation or reduction in tobacco use. Symptoms of Tobacco Withdrawal include craving for tobacco, irritability, anxiety, difficulty concentrating, restlessness, headache, drowsiness, and gastrointestinal problems.<sup>36</sup>

A number of medical studies, dating back to the 1970s demonstrate the addictive nature of smoking by focusing on behavioral patterns. For example, beginning smokers build up their cigarette intake over time until they reach a stable level that remains constant for the remainder of their lives.<sup>37</sup> It has also been documented that an addicted smoker often adopts a pattern of smoking which includes the first cigarette shortly after waking.<sup>38</sup>

<sup>36</sup> American Psychiatric Association, *Diagnostic and Statistical Manual*, 160 (3d ed. 1987).

<sup>37</sup> 1988 Surgeon General's Report, *supra* note 2, at 149 (citing L.M. Schuman, *Patterns of Smoking Behavior*, Research on Smoking Behavior, 36 (National Inst. on Drug Addiction Research Monograph 17, 1977)).

<sup>38</sup> 1988 Surgeon General's Report, *supra* note 2, at 149 (citing K. Fagerström, *Measuring Degree of Physical Dependence to To-*

Many smokers may say they smoke because they enjoy it, not because they are addicted. And many smokers may, in fact, enjoy smoking, because they are addicted! The concepts of enjoyment and addiction are not mutually exclusive. In fact, one of the additional criterion used to determine addiction, as defined by the Surgeon General and cited above, is the drug's ability to produce a pleasant or euphoric effect.<sup>39</sup> Thus it would be consistent for an addicted smoker to "enjoy" a cigarette.

A smoker may overcome his or her addiction, but it takes a recognition that he or she is addicted and a significant amount of perseverance and a program of behavior modification. The fact that 60 to 70 percent of all smokers express a desire to quit, up to 50 percent may try to quit, and approximately only 5 to 7 percent of smokers do not relapse again after a second quit attempt, reveals the severity of nicotine addiction.<sup>40</sup>

These statistics illustrate that the vast majority of smokers simply cannot cease smoking. Smokers who are nicotine dependent, *i.e.*, those who exhibit the diagnostic characteristics enumerated above, can only cease smoking with the proper amount of determination and professional treatment provided by a well-tailored behavior

*bacco Smoking With Reference to Individualization of Treatment*, 3 Addictive Behaviors 235 (1978)).

<sup>39</sup> 1988 Surgeon General's Report, *supra* note 2, at 7.

<sup>40</sup> L. Solberg, P. Maxwell, T. Kottke, G. Gepner, M. Brekke, A Systematic Primary Care Office-Based Smoking Cessation Program, 30 Journal of Family Practice 647 (1990); 1990 Surgeon General's Report, *supra* note 2 at 597. Also, see M. Venters, T. Kottke, L. Solberg, M. Brekke, B. Rooney, *Dependency, Social Factors, and the Smoking Cessation Process: The Doctors Helping Smokers Study*, 6 American Journal of Preventive Medicine 185 (1990); and R. Hurt, G. Lauger, K. Offord, T. Kottke, L. Dale, *Nicotine-Replacement Therapy With Use of a Transdermal Nicotine Patch—A Randomized Double-Blind Placebo-Controlled Trial*, 65 Mayo Clinic Proceedings 1529 (1990), both are recent clinical research trials, indicating the severity of nicotine addiction.



modification program geared towards smoking cessation. Such a program must be able to respond to the following medical realities:

1. Chronic tobacco use produces a physical dependence that leads to Tobacco Withdrawal upon the initiation of cessation efforts; and
2. Nicotine intake produces some results which smokers perceive as beneficial, *e.g.*, enhanced performance with respect to certain attention and memory tasks, controlled body weight (due to increased metabolic rate), and reduced stress levels.

*1988 Surgeon General's Report, supra note 2, at 468.*

There are also a number of environmental factors which must be addressed by a successful modification program:

1. peer pressure
2. family influences
3. tobacco advertising
4. association of smoking with social and work activities.

*Id.*

Treatment strategies usually fall into one of two categories: pharmacologic or behavioral interventions. Increasingly, treatment strategies involve components of both these interventions. Presently, however, most interventions focus on behavior modification, with the most successful strategies including a combination of approaches such as skills training, group support and self-reward.<sup>41</sup> From a pharmacologic standpoint, nicotine replacement strategies are used to reduce Tobacco Withdrawal and improve the success rate of behavior modification techniques.<sup>42</sup>

<sup>41</sup> *1988 Surgeon General's Report, supra note 2, at 465-471.*

<sup>42</sup> *Id.* at 469-470.

### E. As Physicians We Know

As physicians, we know the great difficulties faced by our patients suffering from nicotine addiction. These difficulties can be measured in part by the number of deaths each year caused by smoking. The Surgeon General's 1990 Report, entitled "The Health Benefits of Smoking Cessation" cites 1985 data which estimates 390,000 Americans die each year from diseases caused by smoking; more than half of these deaths are caused by heart disease and lung cancer.<sup>43</sup> The Surgeon General estimates that of the 390,000 deaths, 99 percent of them occurred in people who began smoking prior to the Surgeon General's 1964 Report.<sup>44</sup>

The Court now has before it the medical evidence concerning the known health hazards of smoking and in particular, the addictive nature of nicotine. This evidence dates back to the 1920s when the first linkages between smoking cigarettes and cancer were discovered, continues through the late 1950s and early 1960s when the first *causal* connections between smoking cigarettes and lung cancer were discovered, reviews the 1970s and 1980s when the addictive properties of nicotine were unmasked and causal links to numerous cancers were reaffirmed and strengthened, and concludes with emphasizing that nicotine addiction is so powerful that most smokers cannot overcome it by themselves. Having the benefit of all of the relevant medical data before it, the Court can now review this medical evidence in conjunction with its review of the relevant statutory language and legislative history to decide whether the Labeling Act implicitly preempts state tort claims and protects tobacco companies if they fail to warn consumers or suppress cigarette-related health information or intentionally deceive consumers about the nature and extent of the health hazards

<sup>43</sup> *1990 Surgeon General's Report, supra note 2, at v.*

<sup>44</sup> *1989 Surgeon General's Report, supra note 1, at 22.*

of smoking. From a medical vantage point, given all of the medical evidence presented and the powerful addictive properties of nicotine, the Amicus suggest that the Labeling Act *cannot* provide the protection sought.

### CONCLUSION

For all of the foregoing reasons, the judgment of the Court of Appeals upholding Respondents' preemption claim should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

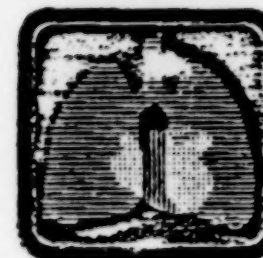
RAYMOND D. COTTON \*  
SHERMAN S. POLAND  
MICHAEL M. GABA  
ROSS MARSH FOSTER MYERS  
& QUIGGLE  
888 Sixteenth Street, N.W.  
Washington, D.C. 20006  
(202) 822-8888  
*Attorneys for American College  
of Chest Physicians*

\* Counsel of Record

May 23, 1991

### APPENDIX

*american  
college of  
chest  
physicians*



*Pledge*

*As a Member of American College of  
Chest Physicians and a leader in the most  
important struggle faced by chest physicians,  
the prevention and control of our major health  
problems of lung cancer, cardiovascular and  
chronic pulmonary disease, I shall make a special  
personal effort to control smoking and to eliminate  
this hazard from my office, clinic and hospital.  
I shall ask all of my patients about their  
smoking habits and I shall assist the cigarette  
smoker in stopping smoking. I make this  
pledge to my patients and to society.*



10  
No. 90-1038

Supreme Court, U.S.

FILED

MAY 24 1991

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**

October Term, 1990

THOMAS CIPOLLONE,

*Petitioner,*

v.

LIGGETT GROUP, INC.,  
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UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

BRIEF OF AMICUS CURIAE  
ASSOCIATION OF TRIAL LAWYERS OF AMERICA  
IN SUPPORT OF PETITIONER

Michael C. Maher, Esq.  
1050 31st St., N.W.  
Washington, DC 20007  
(202) 965-3500

*President, Association of  
Trial Lawyers of America*

Jeffrey Robert White\*  
1050 31st St., N.W.  
Washington, DC 20007  
(202) 965-3500

*Attorney for Amicus Curiae  
\*Counsel of Record*



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No. 90-1038

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BRIEF OF AMICUS CURIAE  
ASSOCIATION OF TRIAL LAWYERS OF AMERICA  
IN SUPPORT OF PETITIONER

---

IDENTITY AND INTEREST OF AMICUS CURIAE

The Association of Trial Lawyers of America [ATLA] respectfully submits this brief as amicus curiae in support of Petitioner in this case. Letters of consent by the parties to the filing of this brief have been filed with the clerk.

ATLA is a voluntary bar association of about 65,000 trial attorneys from every State and many foreign countries. ATLA members primarily represent victims: Those who have suffered personal injury, infringement of their civil rights, property damage, or economic loss. State law has traditionally afforded a remedy in tort by which victims may seek fair compensation from wrongdoers.

Increasingly, elements of American business and industry who may be defendants in state tort actions are seeking refuge in the doctrine of federal preemption. There are circumstances in which federal displacement of state tort remedies may be justified. In other instances, immunity from state law is urged by those whose objective is immunity from any accountability, where Congress has not provided for meaningful alternative regulation and remedies. Such a regulatory gap represents a failure of government in one of the most fundamental obligations to its citizens -- the right to legal recourse for injury. The preservation of our system of federalism demands that courts foreclose state remedies only upon clear and unambiguous evidence that Congress so intends.

### **SUMMARY OF ARGUMENT**

The Supremacy Clause permits Congress to preempt state law. This Court has clearly enunciated and consistently applied a set of principles to give effect to the preemptive purpose of Congress. At the same time, due regard for healthy federalism has led the Court to prescribe a presumption against federal preemption of state law. This presumption is especially strong when Congress legislates in an area traditionally occupied by the States. And the presumption is stronger yet where Congress is claimed to have supplanted traditional state tort remedies without providing an alternative avenue for redress.

In this case, the lower court erred in departing from these accepted principles and drastically expanding the scope of federal preemption. The lower court properly determined that the Federal Cigarette Labeling and Advertising Act did not expressly preempt state products liability law and did not occupy the field. The lower court erred, however, in ignoring the strong presumption against preemption and finding that tort awards actually conflicted with the federal statute.

Determination that a state law that stands as an "obstacle" to the accomplishment of the objectives of Congress is not an appropriate standard for preemption of state tort law. Moreover, jury damage awards are not the equivalent of state regulations that might conflict with federal regulation. Congress itself has made it clear that tort actions and federal regulation can coexist in the same regulatory scheme.

### **ARGUMENT**

#### **I. COURTS MAY NOT SET ASIDE STATE TORT LAW REMEDIES TRADITIONALLY AVAILABLE TO INJURED VICTIMS AS PREEMPTED BY FEDERAL LAW UNLESS CONGRESS HAS CLEARLY AND UNAMBIGUOUSLY SO INTENDED.**

##### **A. This Court has Enunciated Clear Principles To Resolve Questions of Federal Preemption.**

This case need not have come before this Court. It is true that the issue presented -- the tension between federal law and state law -- is fundamental in our system of federalism. It is also true that the balance is sometimes delicate. Striking that balance, however, is the responsibility of Congress. This Court has clearly enunciated and



consistently applied the principles under which questions of preemption may be resolved, giving full effect to the Supremacy Clause and to the demands of federalism.

All the tools which the lower court needed to properly resolve the issues in this action had been set forth by this Court in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). However, the Third Circuit, giving only scant recognition to *Silkwood*, struck out on its own course. The result was, in the words of Prof. Lawrence Tribe, "a major departure from established principles of federalism," threatening the rights which states have afforded citizens in a wide variety of situations touched by a federal regulatory presence. L. Tribe, *Anti-Cigarette Suits, Federalism With Smoke and Mirrors*, *The Nation*, June 7, 1986, at 788. At that point, it became necessary for this Court to correct this error.

Plaintiff asserts a products liability action, seeking compensation for the smoking-related death of Rose Cipollone. Protecting consumers from hazardous products, including products which are dangerous in the absence of adequate warnings, and affording fair compensation to those who are injured by them, is a traditionally strong state interest. See *Freund v. Cellofilm Properties, Inc.*, 87 N.J. 229, 238, 432 A.2d 925 (N.J. 1981)(policy basis for strict liability for failure to warn); *Feldman v. Lederle Laboratories*, 97 N.J. 429, 461, 479 A.2d 374 (N.J. 1984)(duty to warn); *O'Brien v. Muskin Corp.*, 94 N.J. 160, 463 A.2d 298 (1988)(strict liability represents an allocation of the risk of injuries caused by unsafe products); *Dewey v. R.J.Reynolds Tobacco Co.*, 121 N.J. 69, 91, 577 A.2d 1239 (1990)(holding that federal law does not preempt product liability actions for failure to warn of the dangers of cigarettes, emphasizing that a primary purpose of tort law is compensation of victims). These strong state interests have long been widely acknowledged. See generally Wade,

*On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 826 (1973); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 Tenn. L. Rev. 363, 371 (1965)(noting suits against cigarette manufacturers).

Defendants assert that Congress displaced state law and deprived injured victims of their right to seek just compensation with respect to a single product. The Federal Cigarette Labeling and Advertising Act, as amended in 1970, announces:

It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby --

- (1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
- (2) commerce, and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331 (1982).

Toward this end, Congress required each package of cigarettes to bear the statement: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." 15 U.S.C. § 1333 (1976).

Congress also included in the Act a preemption provision:

- (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
- (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising and or promotion of any cigarettes the packages of which are labelled in conformity with the provisions of this chapter.

15 U.S.C. § 1334 (1982).

There is no doubt that the Supremacy Clause gives Congress the power to displace state law.<sup>1</sup> In determining whether Congress has exercised this power, this Court has emphasized that "the purpose of Congress is the ultimate touchstone." *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 482 (1990); *California Fed. Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 284 (1987); *Pilot Life Ins. Co. v. Dedeaux*, 107 S. Ct. 1549, 1552 (1987).

Congress can, of course, indicate its intent to preempt state law by saying so, clearly and unambiguously, so that "the courts' task is an easy one." *English v. General Electric Co.*, 110 S. Ct. 2270, 2275 (1990). Apart from express preemption,

---

<sup>1</sup>This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. Art. VI, cl. 2.

[S]tate law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. . . . If congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

*Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

This Court has consistently announced and applied these preemption principles. See, e.g., *English v. General Electric Co.*, 110 S. Ct. 2270, 2275 (1990); *California v. Federal Energy Regulatory Comm'n*, 110 S. Ct. 2024, 2033 (1990); *California v. ARC America Corp.*, 109 S. Ct. 1661, 1665 (1989); *California Fed. Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 280-81 (1987); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985).

## **B. This Court Has Established a Strong Presumption Against Preemption of State Tort Remedies.**

### **1. Healthy Federalism Requires A Presumption that Congress Did Not Intend Preemption of State Law in Areas Traditionally Occupied By the States.**

Integral to this Court's preemption doctrine is the "basic assumption that Congress did not intend to displace state tort law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Milwaukee v. Illinois*, 451 U.S. 304, 316 (1977). This presumption against preemption is not merely a rule of statutory construction, but is based on "due regard for the



presuppositions of our federal system, including the principle of diffusion of power, not as a matter of doctrinaire localism, but as a promoter of democracy." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959). See also *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)(the presumption against preemption "provides assurance that the federal-state balance . . . will not be disturbed unintentionally by Congress or unnecessarily by the courts.")

Where Congress has legislated in a field which the states have traditionally occupied, the courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This Court has consistently reaffirmed this presumption in favor of state law in areas traditionally occupied by the states. See *English v. General Electric Co.*, 110 S. Ct. 2270, 2277 (1990)(even in the highly regulated field of nuclear facilities, the Court found "no clear and manifest intent on the part of Congress . . . to preempt all state tort laws that traditionally have been available"); *FMC Corp. v. Holliday*, 111 S. Ct. 403, 410 (1990); *Schneidewind v. ANR Pipeline Co.*, 108 S. Ct. 1145, 1156 n.13 (1988); *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143-44 (1963)(noting the legitimate interest of States in the protection "against fraud and deception in the sale of food products within their borders.")

## **2. This Court Has Established a Strong Presumption Against Federal Preemption of State Remedies in the Absence of An Alternative Federal Remedy.**

In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), Chief Justice Marshall stated that "the very essence

of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." Recognition of this basic notion has caused this Court to refuse to find preemption of state law remedies where federal law provided no alternative redress. See *United Construction Workers v. Laburnum Const. Co.*, 347 U.S. 656, 663-64 (1954).

As the *Silkwood* Court stated:

This silence (of congress) takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct. It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.

464 U.S. at 251. Justice Blackmun, dissenting in *Silkwood*, was equally emphatic on this point: "The absence of federal regulation governing the compensation of victims is strong evidence that Congress intended the matter to be left to the States." 464 U.S. at 264 n.7.

Other courts have followed this mandate. See, e.g., *Abbot v. American Cyanamid Co.*, 844 F.2d 1108, 1112 (4th Cir. 1988)("The presumption is even stronger against preemption of state remedies, like tort recoveries, when no federal remedies exist.")

## **C. The Decision to Confer Immunity Upon an Industry is Policy Decision for Congress, Not the Courts.**

It has been suggested that courts have found preemption in cigarette cases in order to protect the tobacco industry from flood of claims. See Ausness, *Cigarette Company Liability: Preemption, Public Policy, and*



*Alternative Compensation Systems*, 39 Syracuse L. Rev. 897, 903 (1988); 32 Vill. L. Rev. 875, 891 (1987).

The tobacco industry is hardly in need of such indulgence. From the mid-1950's to the present, the entire industry has never lost a trial or paid a settlement. Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. Cal. L. Rev. 1423 (1980). Cigarette manufacturers managed to compile this unique record without the benefit of federal preemption. Rather, success has been due to the inability of plaintiffs to overcome a variety of difficult problems of proof. *Id.* at 1425-28; *See also* Comment, *Products Liability: Can It Kick the Smoking Habit*, 19 Akron L. Rev. 269 (1985) (discussing early wave of cigarette cases in detail).

It should be immediately apparent that, even without the protective shield conferred upon cigarette manufacturers by the Third Circuit, few smokers could be confident of prevailing in a product liability action.<sup>2</sup>

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<sup>2</sup>If a significant number of claims for smoking-related injuries would succeed, Congress could protect the industry by establishing a compensation scheme funded by cigarette taxes. Proposals have already been advanced. E.g., Ausness, *Compensation For Smoking-Related Injuries: An Alternative to Strict Liability in Tort*, 46 Wayne L. Rev. 1085 (1990); Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. Cal. L. Rev. 1423 (1980). The tobacco industry, which carries considerable clout in congressional corridors, can be counted on to ensure that the industry remains a viable, if winded, market competitor. The Third Circuit, however, should have more closely heeded this Court's advice: "The courts should not assume the role which our system assigned to Congress." *Pacific Gas & Elec. Co. v. Energy Resources Comm'n.*, 461 U.S. 190, 223 (1983).

As a result, those most affected by the extraordinarily broad view of federal preemption espoused by the lower court will not be smokers or the tobacco industry. They will be those injured by the wide array of products or services touched in some fashion by federal regulation. The Court is therefore not required to blind itself to the political realities surrounding this dispute.

Though this court recognized Congress' preemptive authority as early as *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), over half of the federal statutes which have ever preempted state law were enacted since 1970. Moore, "Stopping the States," National Journal, July 21, 1990 at 1760 (Reporting data supplied by the Advisory Commission on Intergovernmental Relations).

The demand by business and industry for federal preemption is often simply an attempt to avoid state regulation that has become more stringent than federal requirements. *Id.* A report by the Academy for State and Local Government found that, while the federal role in intergovernmental relations has diminished as a result of deregulation and reduced federal aid, state and local authority continues to be preempted. *See* "Industries Try For Federal Regulation," Washington Post, Nov. 29, 1987. The result is a vacuum. The regulatory cat slowly fades, leaving behind a preemptive grin. *Cf. Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 108 S. Ct. 1350, 1355 (1988).

The politically sensitive nature of this conflict amply justifies this Court's refusal to find preemption in the absence of clear and manifest evidence that Congress so intended. The lower court acknowledged that it could find no definitive evidence of Congress' intent to preempt state tort law in either the language of the statute or the

legislative history. 789 F.2d 185-86. Amicus respectfully suggests that if the lower court had accorded the proper weight to this Court's presumption against preemption of traditional state tort remedies, it would have permitted plaintiff's action to go forward.

## II. THE CIGARETTE LABELLING ACT DOES NOT PREEMPT STATE PRODUCT LIABILITY COMMON LAW CAUSES OF ACTION EXPRESSLY OR BY OCCUPYING THE FIELD.

The lower court correctly found that in § 1334 of the Act, Congress did not expressly preempt state tort law. Nor did Congress clearly intend to occupy the field so as to preclude state tort actions. 789 F.2d at 185-86. Every court which has considered this issue has reached the identical conclusion. *Pennington v. Vistron Corp.*, 876 F.2d 414, 418-21 (5th Cir. 1989); *Roysdon v. R.J. Reynolds*, 849 F.2d 230, 234 (6th Cir. 1988); *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 625-26 (1st Cir. 1987); *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 577 A.2d 1239, 1247 (1990); *Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655, 658-60 (Minn. 1989).

The Act prohibits imposition of advertising requirements "under state law," clearly preempting state statutory and regulatory requirements. If Congress had wanted to bar common law tort actions as well, it could have done so explicitly, as it has in other statutes.<sup>3</sup>

<sup>3</sup>See, e.g., Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. § 1715z-17(d), -18(e) (Supp. V 1987)(preempting any "State constitution, statute, court decree, common law, rule, or public policy"); Copyright Act of 1976, 17 U.S.C. § 301(a)(1982)(preempting rights "under the common law or statutes of any State"); Employee Retirement Income Security Act of 1974, 29

Moreover, portions in the legislative history support the notion that Congress anticipated that product liability suits against cigarette manufacturers would continue under the Act. See *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1162-63 (D.N.J. 1984)(quoting HEW Counsel Ellenbogen, referring to previous product liability suits against cigarette makers, and statements by Rep. Fascell, Rep. Watson, and others concerning the Act's effect on the chances of success of future plaintiffs).

Had Congress been silent with respect to preemption, it would have been appropriate for the lower court to search, as it did, for signs of implied intent. See *International Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987)("Given that the Act itself does not speak directly to the issue, the Court must be guided by the goals and policies of the Act in determining whether it in fact preempts [state law].")(emphasis added). In the Cigarette Labeling and Advertising Act, however, Congress was not silent. It included a section specifically entitled "Preemption" which did not include state tort actions.

Amicus suggests that this situation is more closely related to that addressed by Justice Marshall in *California Fed. Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987). Where Congress included two express preemption provisions in the Civil Rights Act, "there is no need to infer congressional intent to pre-empt state laws." See also *California Coastal Comm'n v. Granite Rock Co.*, 107 S. Ct. 1419, 1430 (1987)(A clear expression of Congress' intent "will end our inquiry."); *Forster v. R.J. Reynolds Tobacco Co.*, 423 N.W.2d 691, 696 (Minn. App. 1988), *aff'd in part*,

U.S.C. § 1144(a), (c)(1)(1982)(preempting all state "law, decision, rules, regulations, or other State action having the effect of law").



437 N.W.2d 655 (Minn. 1989) ("It is one thing for courts to try to divine congressional intent from the overall operation of a statute and its legislative history when Congress has been silent, but it is quite another to do so when Congress has included specific provisions, as in did in 15 U.S.C. §1334, expressly addressing what it intended to preempt.")

Amicus suggests that the lower court erred in seeking out implied intent in the face of Congress' express statement of preemption which did not included tort actions. Amicus further submits that the lower court further erred in finding implied preemption.

### III. JURY AWARDS TO VICTIMS OF TORTIOUS CONDUCT DO NOT ACTUALLY CONFLICT WITH FEDERAL REGULATION.

#### A. The *Hines* Test Does Not Apply to State Tort Remedies.

The core of the Third Circuit's holding is

the duties imposed though state common law damage actions have the effect of requirements that are capable of creating "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. See *Hines*, 312 U.S. at 67, 61 S. Ct. at 404 . . ."

789 F.2d at 187.

The quoted passage from *Hines v. Davidowitz*, 312 U.S. 52 (1941), to a far greater extent than any other element in this Court's set of preemption standards, permits a court to interject its own policy judgments for those of Congress. For this reason, commentators have urged its abandonment. Note, *Common Law Claims Challenging Adequacy of*

*Cigarette Warnings Preempted Under the Federal Cigarette Labeling and Advertising Act of 1965: Cipollone v. Liggett Group, Inc.*, 60 St. John's L. Rev. 754, 767 (1986).

This Court need not go so far, however. The context in which Justice Black announced this rule indicates that it was clearly intended to apply in areas of particularly federal concern. At issue was the validity of an Alien Registration Act adopted by the state of Pennsylvania:

Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. And in that determination, *it is of importance that this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority.* Any concurrent state power that may exist is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as is its power to tax. And it is of importance that this legislation deals with the rights, liberties and personal freedoms of human beings, *and is in an entirely different category from state tax statutes or state pure food laws regulating the labels on cans.*

312 U.S. at 67-68. (emphasis added)

This distinction was underscored recently in *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985), which involved local regulation of blood plasma. Justice Marshall, for the Court noted that *Hines* inferred a congressional intent to preempt state law based on the dominance of the federal interest in foreign



affairs. "Needless to say, those factors are absent here. Rather, as we have stated, the regulation of health and safety matters is primarily and historically, a matter of local concern."

471 U.S. at 719.

On this basis, Amicus suggests, the Third Circuit erred in applying the *Hines* test to preempt a state tort remedy.

**B. Jury Awards of Damages Under State Tort Law Do Not Conflict With Federal Regulatory Activities.**

The most damaging and fundamental error in the lower court's decision is the notion that a jury damage award in a tort suit is, for preemption purposes, the equivalent of state regulatory action.

To be sure, there is some support for this view in this Court's opinion in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)

Such regulation can be as effectively exerted through an award of damages as though some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.

As this Court has recently clarified, *Garmon* sought to establish the remedial scheme provided by the National Labor Relations board in place of state remedies "by ensuring that the primary responsibility for interpreting and applying this body of law remained with the NLRB. . . based on the primary jurisdiction rationale." *Brown v. Hotel & Restaurant Employees & Bartenders International Union Local 54*, 468 U.S. 491, 502 (1984). As one district court concluded, *Garmon* is best understood as dealing with the primary jurisdiction of the NLRB and its remedial scheme.

*Wood v. General Motors Corp.*, 673 F. Supp. 1108, 1118 n.14 (D. Mass. 1987), rev'd 865 F.2d 395 (1st Cir. 1988).

Again, this Court's *Silkwood* decision provided all the guidance the lower court needed. In that case, the Court held that federal law preempted state regulation of atomic power, but permitted jury awards for damage due to plutonium contamination.

Congress did not believe that it was inconsistent to vest the NRC with exclusive regulatory authority over the safety aspects of nuclear development while at the same time allowing plaintiffs like Mr. Silkwood to recover for injuries caused by nuclear hazards.

464 U.S. at 258.

Moreover, both dissenting opinions agreed with the majority that compensatory damages, at least, do not conflict with federal regulation. Justice Blackmun stated that "the purpose of punitive damages is to regulate safety, whereas the purpose of compensatory damages is to compensate victims." *Id.* at 263. Justice Powell's view was that, "[t]here is no element of regulation when compensatory damages are awarded, especially when liability is imposed without fault, as authorized by state law." *Id.* at 276 n.3.

This Court reaffirmed this distinction recently in another case involving nuclear safety:

[F]or a state law to fall within the pre-empted zone, it must have some direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels. We recognize that a claim for intentional infliction of emotional distress at issue here may have some effect

on these decisions, because liability for claims like petitioner's will attach additional consequences to retaliatory conduct by employers. As employers find retaliation more costly, they will be forced to deal with complaints by whistleblowers by other means, including altering radiological safety policies. Nevertheless, we believe that this effect is neither direct nor substantial enough to place petitioner's claim in the preempted field.

This result is strongly suggested by the decision in *Silkwood v. Kerr-McGee Corp.*

*English v. General Electric Co.*, 110 S. Ct. 2270, 2278 (1990). See also *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988) (Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not.); *Pilot Life Ins. Co. v. Dedeaux*, 107 S. Ct. 1549, 1554 (1987) ("A common-sense view of the word 'regulates' would lead to the conclusion that in order to regulate insurance, a law must not just have an impact on the insurance industry, but be specifically directed toward that industry." The Court concluded that tort law is not a state law which "regulates insurance.")

Any remaining notion that Congress viewed product liability awards as an obstacle to its purposes evaporated with the passage of a similar measure shortly after the first preemption decisions were rendered. As described by District Judge Mazzone,

Persuasive evidence of Congress' belief that common law claims concerning the adequacy of warnings can exist side by side with federal uniform warning requirements can be found in the Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. No. 99-252, 1986 U.S. Code Cong. & Admin.

News (100 Stat.) 30, passed in February, 1986. This Act is very similar to the Cigarette Labeling Act. . . .

Congress must have been acutely aware during the period the bill was pending -- July, 1985 to February, 1986 -- of cases like *Cipollone* and *Roysdon* in which cigarette manufacturers were arguing that the federal cigarette labeling requirements preempted common law claims. It included in its preemption clause, a 'savings clause': "Nothing in the Act shall relieve any person from liability at common law or under State statutory law to any other person." Sec. 7(c). . . . It seems certain, therefore, that Congress believes that allowing products liability suits involving the adequacy of cigarette warnings will not frustrate its objective of uniform warnings.

*Palmer v. Liggett Group, Inc.*, 633 F. Supp. 1171, 1179 (D. Mass. 1986)

Cigarette-related illness and death result in enormous costs in the form of medical expense and lost productivity. See generally Comment, *Tobacco Under Fire: Developments in Judicial Responses to Cigarette Smoking Injuries*, 36 Catholic U. L. Rev. 643, 645 (1987). The immunity conferred on the entire industry by the Third Circuit is extraordinary. Virtually no other industry, no matter how financially insecure, is as insulated from responsibility for the damage it causes. Virtually no other product is as bereft of social value that might justify such favored treatment. Amicus submits that, under the preemption principles this Court has set forth, the lower court was obligated to require far clearer and unmistakable evidence that Congress intended this result.

**CONCLUSION**

For these reasons, Amicus respectfully urges this Court to reverse the order of the court of appeals.

Respectfully submitted,

Jeffrey Robert White  
1050 31st St., N.W.  
Washington, D.C. 20007  
(202 965-3500  
*Attorney for Amicus Curiae*  
*Association of Trial Lawyers*  
*of America*

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

THOMAS CIPOLLONE,  
*Petitioner,*  
v.

LIGGETT GROUP, INC., *et al.*,  
*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Third Circuit

BRIEF OF THE AMERICAN MEDICAL ASSOCIATION  
AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONER

KIRK B. JOHNSON \*  
EDWARD B. HIRSHFELD  
MICHAEL L. ILE  
AMERICAN MEDICAL ASSOCIATION  
515 N. State Street  
Chicago, IL 60610  
(312) 464-4600  
*Attorneys for Amicus Curiae*  
*American Medical Association*

May 24, 1991

\* Counsel of Record

## QUESTION PRESENTED

*Amicus curiae* will address the following question:

Whether the Federal Cigarette Labeling and Advertising Act, which requires warning labels on cigarette packages and advertisements, preempts state tort law.

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BRIEF OF THE AMERICAN MEDICAL ASSOCIATION  
AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONER

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**INTEREST OF *AMICUS CURIAE***

*Amicus* American Medical Association ("AMA") is a private, voluntary, non-profit organization of physicians. The AMA was founded in 1846 to promote the science and the art of medicine and to improve the public health. Its 280,000 members—over half of all physicians currently licensed to practice medicine—practice in all fields of medical specialization.



*Amicus* has a strong interest in preserving the traditional prerogative of states to protect the health and safety of their citizens and believes that, absent clear evidence of congressional intent, this prerogative should not be undermined by federal action which is itself designed to protect the public health and safety. *Amicus* has a particularly strong interest in the proper outcome of this case because smoking is the leading preventable cause of premature death in this country and is thus a major threat to public health. By conferring an unwarranted immunity from tort suits on the tobacco industry, the court of appeals has provided that industry with significant incentives to pursue marketing practices that encourage individuals to begin or continue smoking, thereby causing untold human suffering. At a minimum, the availability of tort remedies in this setting will place the financial responsibility for these injuries on the parties most responsible for them—tobacco companies. Finally, *amicus* has a strong interest in correcting a misimpression created by some cigarette advertising that the medical community believes that smoking is safe or that certain cigarettes are “just what the doctor ordered.” Pet. App. 6a-16a.

Because of the profound importance of this Court’s decision on the public health of the nation, the AMA wishes to present its views concerning the proper disposition of the tobacco industry’s claim of federal immunity from state tort actions.<sup>1</sup>

#### STATEMENT

Forty years after the first studies linking smoking and lung cancer, and 27 years after the Surgeon General’s first report warning of smoking’s myriad adverse health effects, smoking remains the “leading cause of pre-

<sup>1</sup> Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the AMA’s filing as *amicus curiae* in support of petitioner. Letters of consent have been filed with the Clerk of the Court.

ventable premature death” in this country. U.S. Surgeon General, *Reducing the Health Consequences of Smoking: 25 Years of Progress* 10 (1989) (“Surgeon General’s 1989 Report”). Overall, the toll from smoking is staggering. Smoking is responsible for 30% of all cancer deaths, 21% of all deaths related to coronary heart disease, and 82% of all deaths related to emphysema and chronic bronchitis. *Id.* at 41. All told, cigarette smoke kills almost 500,000 Americans annually, substantially more than 1,000 individuals every day. 40 Center for Disease Control, *Morbidity and Mortality Weekly Report* 63 (Feb. 1, 1991) (430,000 deaths due to smoking); Glantz & Parmley, *Passive Smoking and Heart Disease*, 83 *Circulation* 1, 4 (1991) (53,000 deaths due to passive inhalation of smoke).

Although suspected for centuries, the link between smoking and illness was not firmly established until the early 1950’s. See Doll & Hill, *The Mortality of Doctors in Relation to Their Smoking Habits: A Preliminary Report*, 1 *Br. Med. J.* 1451 (1954); Wynder & Graham, *Tobacco Smoking as a Possible Etiologic Factor in Bronchogenic Carcinoma: A Study of 684 Proved Cases*, 143 *J. A.M.A.* 329 (1950). Relying on these and other studies demonstrating that tobacco causes cancer of the lung, larynx, and oral cavity, as well as chronic bronchitis, the Surgeon General concluded in his landmark 1964 report that “[c]igarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action.” Advisory Committee to the Surgeon General, *Smoking and Health* 33 (1964) (“Surgeon General’s 1964 Report”). One year later, Congress enacted the Federal Cigarette Labeling and Advertising Act, which required manufacturers to warn smokers that smoking posed a threat to their health.

Since 1964, the scientific community has continued to explore the frightening relationship between smoking and illness. It is now known that cigarette smoke, which contains at least 43 carcinogenic agents, Surgeon Gen-

eral's 1989 Report at 86-87, also cause esophageal cancer and is associated with a significantly heightened risk of cancer of the bladder, kidney, pancreas, stomach, cervix and endometrium. *Id.* at 43-58. It is now also known that smoking causes a wide array of nonmalignant, though potentially fatal, diseases and conditions in addition to chronic bronchitis, including coronary artery disease, cerebrovascular disease, peripheral vascular disease, emphysema, and intra-uterine growth retardation, *id.* at 59-72, and is associated with infertility, increased infant mortality, peptic ulcer disease and perhaps osteoporosis.<sup>2</sup> Even passive smokers—those who inhale the smoke of others—are now known to be at risk for smoking-related illnesses, including cancer of the lung and coronary artery disease. Glantz & Parmley at 6-10.

Perhaps most critically, research since 1964 has demonstrated that nicotine in tobacco smoke is highly addictive. According to the Surgeon General, "the pharmacologic and behavioral processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine." U.S. Surgeon General, *The Health Consequences of Smoking: Nicotine Addiction* 9 (1988). Nicotine is "psychoactive ('mood altering') and can provide pleasurable effects. . . . Nicotine also causes physical dependence characterized by a withdrawal syndrome that usually accompanies nicotine abstinence." *Id.* at 215.

Despite overwhelming evidence concerning the deadly and addictive effects of smoking, the tobacco industry has consistently maintained that there is no evidence that smoking actually *causes* the diseases to which it is statistically linked,<sup>3</sup> and the industry still publicly ques-

<sup>2</sup> Smoking was known to be statistically associated with some of these illnesses in 1964, but a causal relationship was not established until more recently. Surgeon General's 1989 Report at 98-99.

<sup>3</sup> The tobacco industry has, at various times, argued that the increase in the incidence of illnesses among smokers may be the

tions the link between smoking and illness.<sup>4</sup> Moreover, the industry still denies that smoking is addictive, claiming that it is merely a "habit" like many other innocuous habits.<sup>5</sup>

More important, the tobacco industry, through advertising and promotional campaigns, has for decades broadcast a message about the health effects of smoking that flatly contradicted the overwhelming scientific evidence and undermined to a great extent the mandated warnings on cigarette packages. The magnitude of this advertising and promotional effort is remarkable. The tobacco industry now spends close to \$3.5 billion annually on advertising and promotion, making cigarettes one of the most heavily marketed consumer products. Surgeon General's 1989 Report at 500; Federal Trade Commission, *Report To Congress Pursuant to the Federal Cigarette Labeling and Advertising Act* 4 (1988). In 1985, cigarettes were the most heavily advertised product in outdoor media, the second most heavily advertised product in magazines, and the third most heavily advertised product in news-

result of improved ability to detect disease; that the association between smoking and illness is purely coincidental; that individuals who smoke are more prone to disease than non-smokers; that no one factor could cause so many diseases; that tobacco cannot be the cause of smoking-related illnesses because not all smokers become ill; and that all of the studies linking smoking and disease are flawed. E. Whelan, *A Smoking Gun: How The Tobacco Trade Gets Away With Murder* 15-27 (1984); Myers, *Federal Trade Commission Staff Report on the Cigarette Advertising Investigation* 1-58-65 (1981). None of these arguments stands up to rigorous analysis. See Myers at 1-65.

<sup>4</sup> See, e.g., *Tobacco Product Education and Health Protection Act: Hearing on S. 1883 Before the Senate Comm. on Labor and Human Resources*, 101st Cong., 2d Sess. 77 (1990) (statement of Charles O. Whitley, Counsel, The Tobacco Institute) (referring to "alleged" health effect of smoking).

<sup>5</sup> *Id.* at 100 ("when you use the word addictive, we think that is the wrong word").



papers. Davis, *Current Trends in Cigarette Advertising and Marketing*, 316 New Eng. J. Med. 725, 727 (1987). To a large extent, this massive campaign is driven by the tobacco industry's need to attract some 5,000 new smokers each day to make up for those who die or quit. K. Warner, *Selling Smoke: Cigarette Advertising and Public Health* 18 (1986).

In its advertising, the tobacco industry conveys the deceptive message that smoking is fully compatible with a healthy, active, successful, and independent lifestyle. Specifically, cigarette advertising distracts the public's attention from the health hazards of smoking by minimizing the health effects of smoking;<sup>6</sup> by showing smokers who convey positive personality characteristics such as sophistication, rugged individualism, attractive appearance, and independence (especially for women);<sup>7</sup> by showing smokers enjoying romantic, business, and social success; and by linking smoking to athletic endeavors, especially outdoors in the fresh air. K. Warner, at 46-48; Federal Trade Commission, *Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act* 5-10 (1978). Smoke itself is rarely shown in advertisements because it is believed to convey a negative

<sup>6</sup> Cigarette advertisements, for example, imply strongly that "low-tar" cigarettes are safe. While there is some evidence that individuals who smoke such cigarettes are at lower risk for contracting certain cancers, there is strong evidence to suggest that the risk of cardiovascular disease, emphysema, and fetal damage is not reduced. See Benowitz, *Health and Public Policy Implications of the "Low-Yield" Cigarette*, 320 New Eng. J. Med. 1619, 1620 (1989); Davis, *Current Trends in Cigarette Advertising and Marketing*, 316 New Eng. J. Med. 725, 728 (1987).

<sup>7</sup> The link to women's independence is best illustrated by the well-known Virginia Slims slogan "You've come a long way baby." Ironically, because so many women now smoke, lung cancer has recently surpassed breast cancer as the leading cause of cancer death among women. Surgeon General's 1989 Report at 46.

image, K. Warner, at 47, and indeed cigarettes themselves are frequently not shown in advertisements.<sup>8</sup>

Increasingly, to maintain or increase sales, cigarette manufacturers have targeted their advertisements at specific segments of the market. In recent years, for example, they have focused on inducing women, minorities, blue collar workers, and children to smoke.<sup>9</sup> See *Reynolds, After Protests, Cancels Cigarette Aimed at Black Smokers*, N.Y. Times, Jan. 20, 1990, at A1, col. 3; B. Maxwell & M. Jacobson, *Marketing Disease to Hispanics: The Selling of Alcohol, Tobacco, and Junk Foods* 37-42 (1989); Davis, at 728-31. Of these groups, children are clearly at the highest risk because they are the most susceptible to advertising. More than 90% of regular smokers begin to smoke before the age of 20, and, although most young people are aware, to some extent, that smoking is dangerous, most have significant misperceptions about the gravity of the risk. See Surgeon General's 1989 Report at 212-16; Leventhal, Glynn & Fleming, *Is the Smoking Decision an 'Informed Choice'?*, 257 J. A.M.A. 3373-76 (1987).

Children are not the only Americans who misperceive the risks of smoking. Due to the efforts of the Surgeons General and many others, most Americans are now generally aware that smoking is unhealthy. Nevertheless, the public's knowledge of the health effects has remained remarkably limited. Surveys demonstrate, for example, that many Americans cannot identify many of the most common illnesses caused by smoking. See Myers, *Federal Trade Commission Staff Report on the Cigarette Advertising Investigation* 3-45-48 (1981). Moreover, studies

<sup>8</sup> Examples of cigarette advertisements are included in the Appendix.

<sup>9</sup> Cigarette advertisements frequently contain cartoon characters, and manufacturers advertise heavily in publications with large teenage readerships. See Davis, at 730.



show that Americans have little understanding of just how dangerous cigarettes are. Americans underestimate substantially the absolute health risk of smoking, the relative risk of dying or of developing disease, and the risks of dying from smoking compared to the risk of dying from other causes. Surgeon General's 1989 Report at 204-12.

In sum, cigarettes are powerfully addictive and frequently lethal products. Responding to mounting evidence of the adverse effects of smoking more than 25 years ago, Congress required manufacturers to warn consumers that smoking was dangerous. Through a massive campaign of disinformation, however, manufacturers have undermined the force of this warning and have continued to induce new smokers to try, and to continue to use, their inherently dangerous product. Ironically, the tobacco industry now argues that Congress, in the legislation requiring manufacturers to warn consumers of the health consequences of their product, also immunized this industry from all tort suits.

#### SUMMARY OF ARGUMENT

In the Federal Cigarette Labeling and Advertising Act ("the Labeling Act"), Congress responded, first, to the growing body of scientific evidence discussed above that linked smoking to a number of fatal diseases, and, second, to a number of diverse and potentially conflicting regulatory measures that state and local governments, as well as the Federal Trade Commission, were considering implementing in response to this scientific evidence. The Labeling Act established a nationally uniform warning for cigarette packaging and advertising that was designed, primarily, to inform consumers of the hazardous nature of smoking and, secondarily, to forestall the confusion and economic dislocations that numerous inconsistent labeling requirements might cause.

The Labeling Act, however, was not designed to preempt state common law tort actions such as those that petitioner brought against respondents, nor does the Act have such preemptive force. Such state tort actions, which deter conduct injurious to the public health and safety and/or provide remedies to injured individuals, touch on areas that are traditionally matters of local concern. *Barsky v. Board of Regents*, 347 U.S. 442, 449 (1954). While Congress certainly can preempt state law even in areas that lie at the core of the states' historic police powers, it must do so clearly and unambiguously, and any doubts as to the preemptive sweep of a federal law that might displace such powers must be resolved against preemption. *English v. General Elec. Co.*, 110 S. Ct. 2270 (1990).

Here, the language, purpose, and history of the Labeling Act all militate against a finding of preemption. The Labeling Act's express preemption provision is a narrow one, prohibiting states from requiring *statements* other than the congressionally mandated warning on cigarette packages, see 15 U.S.C. § 1334(a), and barring States from enacting cigarette industry-specific laws or regulations governing cigarette advertising and promotion. *Id.* § 1334(b). Neither subsection unambiguously purports to displace all state laws that relate in any way to smoking.

The Labeling Act, moreover, does not impliedly preempt state tort actions. By mandating a single-sentence warning that smoking is injurious to health, Congress in no way occupied the entire field of smoking and health. Nor is there any actual conflict between the Labeling Act and state tort law. Compliance with both the federal warning requirement and any obligations imposed by state tort law is not physically impossible. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 257 (1984). Moreover, to the extent there is any tension between the incidental regulatory effects of state tort law and the Labeling Act's secondary goal of uniformity, the

legislative<sup>9</sup> debates surrounding the Act, all of which assumed the continued availability of state tort actions, and the language of the Act itself, make clear that such tension is not only tolerable, but that the goal of promoting public awareness of the health hazards of smoking must take precedence. *Silkwood*, 464 U.S. at 254-57.

### ARGUMENT

Whether federal legislation preempts state law is ultimately a question of congressional intent. *Schneidewind v. ANR Pipeline, Co.*, 485 U.S. 293, 299 (1988). Congress may manifest a desire to displace state law in several ways. First, Congress may preempt state law expressly. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Second, preemptive intent may be inferred where the scheme of federal regulation is so comprehensive or pervasive that Congress can be said to have "left no room" for supplementary state regulation. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Finally, even where Congress has not completely displaced state regulation, state law may nevertheless be preempted to the extent it actually conflicts with federal law. Conflicts arise when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Several well-settled principles guide this Court's preemption analysis. Thus, while Congress certainly can preempt state law even in areas, such as public health and safety, that are traditionally matters of local concern, *Barsky*, 347 U.S. at 449, its "intent to supersede state laws must be 'clear and manifest.'" *English*, 110 S. Ct. at 2275 quoting *Rath Packing Co.*, 430 U.S. at 525, quoting *Santa Fe Elevator Corp.*, 331 U.S. at 230. This

Court, therefore, will "not [] conclude that Congress legislated the ouster of [state law] . . . in the absence of an unambiguous congressional mandate to that effect." *Florida Lime & Avocado Growers, Inc.*, 373 U.S. at 146-47. As *amicus* demonstrates below, no mandate to eliminate state tort law and immunize the tobacco industry from liability for the injuries its products cause can be found in the Labeling Act.

### I. CONGRESS DID NOT EXPRESSLY PREEMPT STATE TORT LAW IN THE LABELING ACT.

Section 5 of the Labeling Act specifies the statute's preemptive effect. At the time of the Act's initial passage, Section 5 provided that:

(a) [n]o statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.

(b) [n]o statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Pub. L. No. 89-92, 79 Stat. 300 (1965). In 1970, Congress modified subsection (b) to provide as follows:

[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334(b).

Because these provisions do not clearly and unambiguously preempt state common law torts, every court that has passed on the question has concluded that the Labeling Act's preemption provision does not extend to state tort law.<sup>10</sup> These decisions are plainly correct.

<sup>10</sup> See Pet. App. 100a-103a; *Pennington v. Vistrion Corp.*, 876 F.2d 414, 418 (5th Cir. 1989); *Roydon v. R. J. Reynolds Tobacco*

The language of the 1965 and 1970 preemption provisions falls far short of evincing a clear congressional desire to displace the states' historic police powers. To begin with, neither version of Section 5 explicitly mentions state common law. The absence of any such reference stands in stark contrast to the preemption provisions of other enactments in which Congress has left no doubt that it meant to displace state common law.<sup>11</sup>

Had Congress actually intended the Labeling Act to preempt petitioner's common law claims, moreover, it could hardly have chosen a more elliptical and ultimately ineffectual way of expressing its desire than the language employed in Section 5. While some tort actions might induce cigarette manufacturers to include additional statements about the health hazards of smoking on cigarette packages, tort law does not *require* the only action sub-

*Co.*, 849 F.2d 230, 234 (6th Cir. 1988); *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 625 (1st Cir. 1987); *Stephen v. American Brands, Inc.*, 825 F.2d 312, 313 (11th Cir. 1987); *Rogers v. R.J. Reynolds Tobacco Co.*, 557 N.E.2d 1045, 1050 (Ind. Ct. App. 1990); *Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655, 658 (Minn. 1989); *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 577 A.2d 1239, 1247 (1990) (reproduced at Pet. App. 181a-226a); *McSorley v. Philip Morris, Inc.*, 565 N.Y.S.2d 537, 538-39 (1991); *Hite v. R.J. Reynolds Tobacco Co.*, 396 Pa. Super. 82, 578 A.2d 417, 419-20 (1990); *Philips v. R.J. Reynolds Indus., Inc.*, 769 S.W.2d 488, 490 (Tenn. Ct. App. 1988); *Carlisle v. Philip Morris, Inc.*, 805 S.W.2d 498, 517 (Tx. Ct. App. 1991).

<sup>11</sup> See, e.g., the Housing and Urban-Rural Recovery Act of 1983, 12 U.S.C. § 1715z-17(d) (preempting any "State constitution, statute, court decree, *common law*, rule, or public policy" affecting specified mortgages) (emphasis added); the Copyright Act of 1976, 17 U.S.C. § 301(a) (providing that "no person is entitled to any [copyright] or equivalent right . . . under the *common law* or statutes of any State") (emphasis added); Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a) (superseding "any and all State laws insofar as they may now or hereafter *relate to any employee benefit plan*") (emphasis added).

section (a) prohibits—the making of statements on cigarette packages. Even the slightly broader language of Section 5(b) does nothing more than bar states from enacting cigarette industry-specific laws and regulations. Indeed, to read the "based on smoking and health" language more broadly—i.e., as barring all state law-based requirements or prohibitions that *relate to* smoking and health—would prove entirely too much: such a reading would, for example, exempt the cigarette industry from generally applicable state and local laws governing the size and placement of advertisements on public streets or highways—a result that finds absolutely no support in the Labeling Act's structure, purpose, or history.

*Amicus* submits that common law tort actions fall outside the reach of Section 5, which, by its plain terms, only preempts state efforts to pass cigarette industry-specific laws and regulations.<sup>12</sup> In any event, because the reading of Section 5 that *amicus* posits is at least plausible, the preemptive effect of the Labeling Act on state tort law is, at a minimum, ambiguous. Such ambiguity is sufficient, standing alone, to defeat a claim of express preemption.

## II. THE LABELING ACT DOES NOT IMPLIEDLY PRE-EMPT STATE TORT LAW.

### A. Congress Has Not Occupied The Entire Field Of Protecting The Public From The Myriad Dangers Caused By Or Associated With Cigarette Smoking.

The narrow scope of the Labeling Act's preemption provision is hardly surprising in light of the limited objectives of the Act itself. The catalyst behind the Act

<sup>12</sup> Indeed, this is the reading that Congress itself has endorsed. See S. Rep. No. 566, 91st Cong., 1st Sess., reprinted in 1970 U.S. Code Cong. & Admin. News 2652, 2663 ("The State preemption of regulation or prohibition with respect to cigarette advertising is narrowly phrased to preempt only State action based on smoking and health").



was the Surgeon General's 1964 report, which concluded that cigarette smoking was a significant health hazard warranting "appropriate remedial action." The Report itself, however, did not specify what remedial action should be taken or by whom, and, as a result, a number of state and local governments (as well as the Federal Trade Commission) responded by proposing or adopting a variety of regulatory measures, principally warning requirements on cigarette packages and advertising warning requirements. *Hearings on H.R. 643, 1237, 3055, 6543 Before the House Comm. on Interstate & Foreign Commerce*, 91st Cong., 1st Sess. 554 (1969).

The Labeling Act represented Congress' response to both the growing body of medical evidence that smoking was hazardous, and the potentially inconsistent state and local warning requirements that the medical evidence threatened to spawn. Thus, the Act established a nationally uniform warning for cigarette packaging and advertising that was designed, first and foremost, to inform consumers of the hazardous nature of smoking and, secondarily, to forestall the confusion and economic dislocations that numerous inconsistent labeling requirements could cause.<sup>13</sup> Consistent with these objectives, Congress preempted state authority to prescribe additional or different affirmative warnings on cigarette packaging or in cigarette advertising, and barred states from

<sup>13</sup> The subordinate nature of the Labeling Act's secondary goal is made clear in the Act's statement of purpose, which provides that the national economy is to be protected from the effects of diverse warning requirements "to the maximum extent consistent with [the] declared policy" of informing the public of the dangers of smoking. 15 U.S.C. § 1331(2). See also H.R. Rep. No. 449, 89th Cong., 1st Sess., reprinted in 1965 U.S. Code Cong. & Admin. News 2350 ("The principal purpose of the bill was to provide adequate warning to the public of the potential hazards of cigarette smoking by requiring the labeling of cigarette packages") (emphasis added).

enacting prohibitions that would effectively compel such affirmative warnings.

It is altogether untenable, however, to suggest that, by prescribing a single-sentence warning and barring States from requiring any other, Congress occupied the entire field of protecting the public from the myriad dangers caused by or associated with cigarette smoking. The Labeling Act is in no sense "a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it . . . ." *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 204 (1983) (citations and internal quotations omitted). To the contrary, it says nothing whatever about the duties and liabilities of cigarette manufacturers or the rights of their consumers;<sup>14</sup> it does not purport to regulate the marketing behavior of the cigarette industry or the safety of cigarette products; it provides no alternative means of redress for the hundreds of thousands of people who die or become seriously ill each year as a result of smoking, nor does it establish a fund out of which these victims of smoking may be compensated.<sup>15</sup>

The explanation for Congress' limited response is simple, viz., it lacked a full understanding of the health hazards posed by smoking and the societal impacts those hazards would have. The Surgeon General's 1964 Report concluded that cigarette smoking caused a number of fatal illnesses (notably lung cancer) and was associated with a number of others (such as coronary artery dis-

<sup>14</sup> Compare *International Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987) (Clean Water Act "specifically provides for a process whereby the[] interests [of source and affected States] will be considered and balanced . . .").

<sup>15</sup> See, e.g., *Federal Coal Mine Health and Safety Act*, 30 U.S.C. § 901 *et seq.* (establishing comprehensive compensation scheme for victims of black lung disease).

ease), and that deaths attributable to these diseases had increased "with great rapidity over the past few decades." Surgeon General's 1964 Report at 25. The Report acknowledged, however, that the "total number of excess deaths causally related to cigarette smoking in the U.S. population cannot be accurately estimated," *id.* at 31, at least in part because of the difficulties of pinpointing the causal relationship between cigarette consumption and certain diseases.<sup>16</sup> Recognizing the need for further research, Congress required the Secretary of Health, Education and Welfare (now Health and Human Services) to report annually on "current information [o]n the health consequences of smoking, and . . . [to make] such recommendations for legislation as he may deem appropriate." 15 U.S.C. § 1337(a).

Subsequent research has revealed that smoking is even more dangerous than previously thought. As *amicus* explained above, smoking is now known to cause esophageal cancer as well as a variety of serious and potentially fatal vascular diseases, and is known now also to be associated with a number of other malignant and non-malignant diseases and impairments of the reproductive system, some of which were not even considered at the time of the 1964 report. Perhaps most significantly, the pharmacologic and behavioral bases of nicotine addiction have only recently been established. U.S. Surgeon General, *The Health Consequences of Smoking: Nicotine Addiction* 215 (1988).<sup>17</sup>

<sup>16</sup> See, e.g., Surgeon General's 1964 Report at 31 ("It is recognized that no simple cause-and-effect relationship is likely to exist between a complex product like tobacco smoke and a specific disease in the variable human organism"); *id.* at 38-39 (noting that effects of nicotine and smoking "do not account well for the observed association between cigarette smoking and coronary disease," which, then as now, was one of the leading causes of death in males).

<sup>17</sup> Congress, of course, has been kept apprised of these developments. Thus, for example, in the Senate Report that accompanied

The suggestion that Congress was 1) aware that smoking was suspected to be one of the nation's leading causes of preventable death and illness and 2) aware that the full nature of the health effects of smoking had not been determined, yet nevertheless chose to strip millions of American smokers of any right to redress for injuries inflicted by this lethal product is not realistic. See *Silkwood*, 464 U.S. at 252 ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct").<sup>18</sup> To the contrary, the Labeling Act can only be understood as Congress' first effort to explore, rather than to occupy, the expanding field of smoking-related illness and death.

#### **B. There Is No Actual Conflict Between State Tort Action And The Purposes Of The Labeling Act.**

Because state tort law can only compel the payment of damages, compliance with such state laws and the Labeling Act is not physically impossible. *Cf. Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988) (operator of federal facility "may choose to disregard [State] safety regulations and simply pay an additional

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the 1970 amendments to the Labeling Act, Congress noted the then-current advances in medical research. See S. Rep. No. 566, reprinted in 1970 U.S. Code Cong. & Admin. News at 2654-55.

<sup>18</sup> Such a result is particularly unthinkable in view of the fact that cigarette manufacturers never even asked Congress to exempt them from liability under state tort regimes (even though tort suit had been brought against manufacturers as early as the 1950s, see Comment, *The Product Liability of the Tobacco Industry: Has Cipollone v. Liggett Group Finally Pierced the Cigarette Manufacturers' Aura of Invincibility?*, 30 B.C.L. Rev. 1103, 1117-26 (1989)), and instead sought relief only from the "intolerable" burden of inconsistent labeling requirements. See *Cigarette Labeling and Advertising Act: Hearings on S. 559 and S. 547 Before the S. Comm. on Commerce*, 89th Cong., 1st Sess. 246 (1965) (testimony of Bowman Gray, Chairman, R.J. Reynolds Tobacco Company).



workers' compensation award if an employee's injury is caused by a safety violation"); *Silkwood*, 464 U.S. at 257 ("Paying both federal fines and state-imposed punitive damages for the same incident would not appear to be physically impossible"). The Labeling Act can only preempt state tort actions, therefore, if such actions frustrate the purposes and objectives of the Act.

The Third Circuit concluded that state tort law is preempted based on its determination that state tort actions would upset Congress' "carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of the national economy." Pet. App. 105a. This reasoning is flawed in a number of crucial respects.

To begin with, as the previous analysis reveals, the Labeling Act does not represent a carefully drawn balance between the competing interests of smokers and manufacturers. Congress did not purport to fix the rights and liabilities of smokers and manufacturers or to regulate their relationship in any way. See *supra* at 15-16. The Third Circuit's contrary determination, moreover, necessarily assumes that Congress established the federally-mandated warning as a cap on the amount of information the public could obtain concerning the manifold dangers of smoking, "lest the public learn too much about the hazards of smoking for the good of the tobacco industry and the economy." *Banzhaf v. FCC*, 405 F.2d 1082, 1089 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). This cynical assumption is unwarranted given Congress' awareness that "cigarette smoking contributes substantially to . . . the [nation's] overall death rate," Surgeon General's 1964 Report at 31, and its recognition that the full scope of smoking's contribution to the nation's mortality was not yet known.<sup>19</sup>

<sup>19</sup> In construing the preemptive force of the Atomic Energy Act, this Court noted in *Silkwood* that, while the primary purpose of the Act was the promotion of nuclear power, Congress did not

State tort actions, moreover, do not upset the only balance Congress actually struck in the Labeling Act: that between the desire of state and local entities to prescribe mandatory warning requirements and the desire of the tobacco industry to avoid diverse and inconsistent labeling requirements. While damage awards may induce cigarette manufacturers to provide additional information about the dangers of their products, to refrain from disseminating false information, or to attempt to make their products safer, such awards neither require nor prohibit any particular conduct with respect to the advertising of cigarettes, and in no way do they compel a manufacturer to place a state-prescribed warning label on any cigarette package or advertisement.<sup>20</sup> Cf. *International Paper Co.*, 479 U.S. at 495 (state nuisance laws preempted because they would subject polluters "to the threat of legal and equitable penalties . . . [which] would compel the [polluter] to adopt different control standards and a different compliance schedule from those approved by the EPA . . ."; a state court "also could require the [polluter] to cease operations by ordering immediate abatement") (emphases added).

Finally, to the extent there is any tension between the incidental regulatory effects of state tort actions and the secondary purpose of the Labeling Act, Congress plainly viewed such tension as tolerable. *First*, Congress barred states from imposing requirements or prohibitions on

intend to pursue nuclear power at all costs. 464 U.S. at 257. Here, by contrast, the primary purpose of the Labeling Act was to protect the public health; indeed, even the secondary purpose was not to "promote" an industry whose products "contribute[] substantially . . . to the overall death rate," Surgeon General's 1964 Report at 31, but simply to protect that industry from diverse and inconsistent labeling requirements.

<sup>20</sup> Strict liability actions, moreover, do not induce any behavior modification, except perhaps a total cessation of a subject activity, since by definition a defendant cannot take remedial steps to avoid liability under this tort theory.



cigarette advertising "based on," rather than those "relating in any way to," smoking and health. See *supra* at 13. Having chosen to preempt only cigarette-specific state laws and regulations, Congress must be presumed to have concluded that the incidental regulatory effects of generally applicable state tort duties are fully compatible with the purposes of the Act.

Second, the legislative history makes unmistakably clear that Congress believed state tort actions would continue to be available after passage of the Act. Thus, while there is not a single statement in the legislative history indicating that Congress intended to preempt state tort law, there was considerable discussion concerning the effect that the federally-mandated warning would have on the *outcome* of such suits, particularly in duty to warn claims.<sup>21</sup> Cf. *Silkwood*, 464 U.S. at 254 ("the importance

<sup>21</sup> See, e.g., *Cigarette Labeling and Advertising Act: Hearings on H.R. 643, 1237, 3055, 6543 Before the House Comm. on Interstate and Foreign Commerce, 91st Cong., 1st Sess. 579 (1969)* (statement of Congressman Watson) ("[N]owhere in the Act of 1965 does it preclude an individual or prevent an individual from pursuing a common-law liability [claim], as far as I know"); *Id.*, at 577-82, 589 (congressional discussions concerning effect of 1965 Act on assumption-of-risk defense); *Cigarette Labeling and Advertising Act: Hearings on H.R. 2248, 3014, 4007, 7051, 4244 Before the House Comm. on Interstate and Foreign Commerce, 89th Cong., 1st Sess. 176 (1965)* (statement by Theodore Ellenbogen, Acting Assistant General Counsel of the Department of Health, Education, and Welfare) (Common-law suits were "a private matter . . . not regulated by this bill"); *Memorandum to Record, Hearings on H.R. 2248 Before the House Comm. on Interstate and Foreign Commerce, 89th Cong., 1st Sess. 177-78 (1965)* ("Assuming a clear statement [required of manufacturers], suits based on negligence probably would be barred on three grounds. Having warned the buyer, the manufacturer could not be said to be negligent; the buyer is contributorily negligent in using a product he knows might harm him; and having been warned the buyer assumes the risk attendant to the use of the cigarettes. . . . [A]ctions based on breach of warranty would probably be unsuccessful. When a seller warns a buyer of the possibility of a certain form of injury, it cannot be said that he

of the legislation for present purposes is not so much in its substance, as in the assumptions on which it was based"). Congressional recognition of the significant, non-preemptive effects federal law would have on state tort law actions is completely inconsistent with the contention that Congress immunized tobacco companies by broadly preempting state law. Moreover, Congress understood that for many state tort actions the warning labels would significantly enhance the tobacco companies' arguments that they acted reasonably. This would in turn have a significant impact on the deliberations of the trier of fact in a tort action. In short, Congress did not ignore the tobacco industry; it simply did not immunize it, which is hardly surprising in view of the fact that the industry did not seek such relief. See note 18, *supra*.

Whatever the evidentiary value of the warning label in such actions, however, the significance of this legislative history is crystal clear. Preemption is ultimately a question of congressional intent, and here Congress contemplated the coexistence of the federal warning label requirement and state tort actions against manufacturers even though they comply with that requirement. Under these circumstances, there can be no doubt that Congress viewed any tension between the regulatory effects of tort law and the Labeling Act's requirements as tolerable.

\* \* \*

is warranting that the injury will not occur"; 111 Cong. Rec. 16543-45 (daily ed. July 13, 1965) (statement of Congressman Fascell) ("The legislative record makes it clear that passage of this law and compliance by the manufacturer in no way affects the right to raise the defense of 'assumption of risk' and the legal requirement for such a defense to prevail; nor does it shift the burden of proof, nor could it be considered a legal or factual bar to the plaintiff user. . . . By virtue of the language being required as a result of the law, it would raise the presumption that every company that makes and distributes this product does so with knowledge. If that is true, it would redound to the benefit of a plaintiff bringing an injury suit").

The United States Code abounds with evidence of Congress' concern for the health and welfare of this nation. Federal law regulates the quality and safety of the food and drugs we consume, the cars we drive, the industries in which we work, the air we breathe, and the water we drink. Nevertheless, the cigarette industry contends that in passing a law whose principal purpose was to inform the public of the profound dangers of smoking, Congress granted a blanket immunity from liability to the manufactures of what is today the "leading cause of preventable premature death" in the United States. What is more, the industry contends that Congress singled out this lethal product for such extraordinary treatment without comment or debate, and without granting the hundreds of thousands of people who die or become seriously ill from smoking each year any alternative remedy. Nothing in the Labeling Act's language, purpose, nor history supports, let alone compels, this result.

#### CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

KIRK B. JOHNSON \*  
EDWARD B. HIRSHFELD  
MICHAEL L. ILE  
AMERICAN MEDICAL ASSOCIATION  
515 N. State Street  
Chicago, IL 60610  
(312) 464-4600  
*Attorneys for Amicus Curiae*  
*American Medical Association*

May 24, 1991

\* Counsel of Record

## APPENDIX

1a

APPENDIX



A black and white advertisement for Newport cigarettes. At the top, a family of three (a man, a woman, and a child) are swimming in the ocean, with their arms raised in a joyful gesture. Below the photo, the word "Newport" is written in a large, bold, stylized font. Underneath that, the phrase "Life with pleasure?" is written in a smaller, cursive-style font. To the right of this text are two packs of Newport cigarettes, one labeled "Newport" and the other "Newport Lights". Below the cigarette packs, the text "After all, if smoking isn't a pleasure, why bother?" is printed. At the bottom left, a rectangular box contains the text: "SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide." At the bottom right, there is a small block of fine print containing technical details about the cigarettes.

**Newport**

*Life with pleasure?*

Newport Newport  
Lights

After all, if smoking  
isn't a pleasure, why bother?


SURGEON GENERAL'S WARNING: Cigarette  
Smoke Contains Carbon Monoxide.

10 mg. "tar," 0.9 mg. nicotine av. per cigarette by FTC method.  
11 mg. "tar," 1.2 mg. nicotine av. per cigarette by FTC method.



2a

Back in 1967, the sleep women lost to look good would curl your hair



**VIRGINIA SLIMS**  
YOU'VE COME A LONG WAY, BABY


5 mg "tar," 0.4 mg nicotine av. per cigarette by FTC method.

**SURGEON GENERAL'S WARNING: Cigarette  
Smoke Contains Carbon Monoxide.**

A sleek shape. A cool taste.  
Clearly a number  
made with women in mind.

3a

© 1986, METACLO, INC. 000-0000



**Salem**

*The*  
**REFRESHES**

5 mg "tar," 0.4 mg nicotine av. per cigarette by FTC method.

**SURGEON GENERAL'S WARNING: Cigarette  
Smoke Contains Carbon Monoxide.**

4a



5a



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In The  
Supreme Court of the United States

October Term, 1990

THOMAS CIPOLLONE, Individually and as Executor  
of the Estate of Rose D. Cipollone,

*Petitioner,*

v.

LIGGETT GROUP, INC., a Delaware Corporation; PHILIP  
MORRIS INCORPORATED, a Virginia Corporation; and  
LOEW'S THEATRES, INC., a New York Corporation,

*Respondents.*

On Writ Of Certiorari To The United States  
Court Of Appeals For The Third Circuit

BRIEF *AMICUS CURIAE* OF TRIAL LAWYERS FOR  
PUBLIC JUSTICE, P.C. IN SUPPORT OF PETITIONER

CHARLES S. SIEGEL  
(Counsel of Record)  
BARON & BUDD, P.C.  
8333 Douglas Avenue  
Tenth Floor  
Dallas, Texas 75225  
(214) 369-3605

ARTHUR BRYANT  
PRISCILLA BUDEIRI  
TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C.  
1625 Massachusetts Avenue, N.W.  
Suite 100  
Washington, D.C. 20036  
(202) 797-8600

*Attorneys for Amicus Curiae*  
*Trial Lawyers for Public Justice*



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No. 90-1038

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In The  
**Supreme Court of the United States**  
October Term, 1990

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THOMAS CIPOLLONE, Individually and as Executor  
of the Estate of Rose D. Cipollone,  
*Petitioner,*

v.

LIGGETT GROUP, INC., a Delaware Corporation; PHILIP  
MORRIS INCORPORATED, a Virginia Corporation; and  
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*Respondents.*

---

On Writ Of Certiorari To The United States  
Court Of Appeals For The Third Circuit

---

BRIEF *AMICUS CURIAE* OF TRIAL LAWYERS FOR  
PUBLIC JUSTICE, P.C. IN SUPPORT OF PETITIONER

---

**INTEREST OF AMICUS CURIAE**

Trial Lawyers for Public Justice, P.C. ("TLPJ"), is a national public interest law firm devoted to representing victims of corporate and government abuse. TLPJ is supported by and utilizes the services of more than 900 trial lawyers throughout the United States, and has represented many plaintiffs in cases against manufacturers of dangerous products. TLPJ is the only public interest law firm in the nation dedicated to the preservation of the

states' individual tort systems as the surest, and often sole, means of compensation to victims injured, or the survivors of those killed, by defective products.

In view of TLPJ's commitment to preservation of the nation's tort system, TLPJ has participated, as primary or as *amicus* counsel, in numerous state and federal trial and appellate courts in cases in which the preemption doctrine was a pivotal issue. As in these previous cases, the manufacturers of the dangerous products involved in this action seek to abrogate our tort system through misapplication of the preemption doctrine.

TLPJ seeks to bring to the Court's attention the recent tendency by lower courts to use preemption doctrine in the service of what are transparently tort policy views. In the process, tenets of preemption are forgotten. TLPJ will urge the Court to return the courts to rigorous preemption analysis in line with traditional presumptions. We believe this will vindicate the crucial role of the states' tort systems in compensating victims of dangerous products, and will restore to the analysis the touchstone inquiry into Congressional intent.

---

### SUMMARY OF ARGUMENT

Preempting state tort law in an area of traditional state control, in the absence of a parallel remedy, and in reliance on a speculative "conflict" with federal interests, the decision below strips preemption from its traditional analytical moorings. Under the Third Circuit's decision, and other recent holdings in the product liability field,

the basic inquiry into Congressional intent, and the presumptive viability of state law in the health and safety area, have been discarded. Instead, preemption has become a device for effectuating tort policy goals.

If the proper inquiry into intent is made, however, it is seen that there are several reasons why Congress chose to preempt state regulation, but not tort law, in the Cigarette Labeling Act. First, regulatory law and tort law serve different ends. The former seeks to change conduct; the latter operates primarily to compensate victims of conduct. It is difficult to believe that Congress would vitiate tort law absent some other mechanism to accomplish its main purpose. Moreover, any incidental "regulatory effect" of tort law is to be tolerated under this Court's precedents.

Second, while regulatory law works by limiting the operation of the product marketplace, tort law is a part of the marketplace. That Congress sees fit, from time to time, to abolish conflicting state regulations – which would interfere with the collective legislative choice – does not mean that Congress would also alter the inner workings of the marketplace. Tort law is only one of many factors influencing manufacturers' product costs, and, as its "message" is inherently indistinct, its effect in no sense can be said to be "regulatory" in the same external way regulations are.

We submit that, far from endeavoring to ascertain and adhere to Congress' intent, the lower courts finding preemption in products liability cases are simply using the doctrine to defeat claims in which a defendant has a viscerally attractive argument that there should be no

liability in the face of compliance with government standards. Fortunately, however, traditional tort doctrine accommodates this concern. The Court should stop the conversion of preemption doctrine into tort doctrine. Much of the transformation is facilitated in lower courts by ritualistic reference to this court's statement in a vastly different, jurisdictionally-demarcated context that tort suits can have a regulatory effect. The holding in which that statement came has been applied narrowly by this Court. Moreover, this Court's preemption holdings, in situations much more analogous to that here, honor the traditional viability of state compensation law. Much mischief has occurred, however, in the products liability area by the lower courts' misapplication of the statutory language.

This Court should put a stop to that mischief, and hold that only an unequivocal declaration by Congress and the existence of a parallel remedy will justify a finding of preemption. Such a result will reaffirm the nature of preemption analysis as an inquiry into legislative intent, and will uphold the role of Congress – not the courts – as the architects of the balance of federal and state powers.

---

## ARGUMENT

### I. THE RULING BELOW REPRESENTS AN UNPRECEDENTED EXTENSION OF PREEMPTION DOCTRINE.

The parties undoubtedly will detail the contours of the preemption doctrine, and the standards for finding displacement of state law. We will focus on the reasons Congress reasonably preempted state regulation but not

tort law, and on the principle that tort liability is not preempted absent an unequivocal declaration and a parallel remedy. At the outset, however, we urge the Court to recognize the unprecedented extension of preemption doctrine represented by the ruling before it. The Third Circuit has removed tort liability in an area of traditional state primacy, has left no other remedy for those affected, and has relied on an entirely speculative "conflict" with federal interests.

The Cigarette Labeling Act touches directly, indeed explicitly, on the field of public health and safety, and therefore regulates in an area of traditional state control. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985). There is then, of course, a strong presumption against preemption: "we are not to conclude that Congress legislated the ouster of [a state] statute . . . in the absence of an unambiguous congressional mandate to that effect." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47 (1963).<sup>1</sup>

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<sup>1</sup> The New Jersey Supreme Court recently quoted to like effect Solicitor General Starr, who in turn quoted Justice Frankfurter:

We are persuaded by the view most forcefully stated by Solicitor General Kenneth Starr, in his unpublished monograph "The Law of Preemption," that "[o]ur federal system, with its high regard for the several States' powers of governance requires that judges not preempt state law lightly." *Id.* at 61. Judge Starr recalls Justice Frankfurter's observation that when the Supreme Court considers whether Congress has preempted state law, "[a]ny indulgence in construction should be in favor of the States,

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The holding below also leaves those affected by the cigarette manufacturers' allegedly tortious conduct without any remedy. Here, too, the opposite conclusion is presumed: "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984).

The speculative nature of a "conflict" between tort liability and the federal labeling standard is detailed in Part II below, in a discussion of why the preservation of state compensation law as a counterpart to federal regulation makes sense. The historic boundaries of preemption, and the presumptions which grow out of and embody basic principles of federalism, will be treated exhaustively by the parties. We submit, however, that this Court has never found preemption in circumstances such as these, and that affirmance will signal a radical transformation of preemption analysis from an examination of Congressional intent, protective of our federalist system, to an unfettered exercise in judicial activism, permitting the wholesale displacement of the traditional powers of the states.

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because Congress can speak with drastic clarity whenever it chooses to assume full federal authority." *Id.* at 86 (quoting *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 780, 67 S.Ct. 1026, 1033, 91 L.Ed. 1234-1249 (1947)).

*Dewey v. R. J. Reynolds Tobacco Co.*, 121 N.J. 69, 94, 577 A.2d 1239, 1251 (1990) (holding cigarette claims not preempted). Solicitor General Starr's work is now published in K. Starr, P. Higginbotham, S. Seymour, W. Clark, J. Criswell & J. Sneed, *The Law of Preemption: The Report of the Appellate Judges' Conference* (ABA 1991).

## II. THERE ARE STRONG REASONS WHY CONGRESS CHOSE TO PREEMPT STATE REGULATION BUT LEAVE STATE TORT LAW INTACT

The sole premise of the Third Circuit's holding that Congress must have intended to preempt state tort law as well as state regulation is the court's view that tort verdicts and state regulations are functionally equivalent. We believe the premise is incorrect, for regulatory law and tort law differ in several critically significant ways.

### A. Regulatory Law and Tort Law Serve Different Purposes

Regulatory law and tort law serve different aims and in only the most attenuated sense can a tort verdict be said to equal a regulation. Under any standard preemption analysis, the distinctions between the two – if not the polarity – suffice for their coexistence.

Regulatory law's purpose is to change conduct. It is backed by the coercive force of government, and leaves no room for choice. Regulation addresses future behavior. Tort law, conversely, looks backward: its primary goal is to compensate victims of past conduct. *E.g.*, W. Prosser and P. Keeton, *Prosser & Keeton on Torts* §1 at 5, 7 (West 1984) ("[Tort law] is directed toward the compensation of individuals. . . its primary purpose is to compensate for the damage suffered, at the expense of the wrongdoer.").

It is true that tort law can occasionally have an incidental effect on conduct, and this Court has noted the

possibility. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959). As discussed in Part IIIB below, *Garmon* has since been read narrowly by this Court; the point here is that needs served by tort law are different from those served by regulatory law, and as *Silkwood* emphasizes, it is difficult to believe that Congress would vitiate tort law absent some parallel mechanism for serving its main purpose – compensation. The Court has made this clear in several cases.

*Silkwood* drew on an earlier expression of the reluctance to infer preemption where remedies would be eliminated. In *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 (1954), the Court wrote:

Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. For us to cut off the injured respondent from this right to recovery will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability or their tortious conduct. We see no substantial reason for reaching such a result.

*Id.* at 663-64. Later cases such as *English v. General Electric Co.*, \_\_\_ U.S. \_\_\_, 110 S.Ct. 2270 (1990), and *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988), both discussed in Part IIIA below, likewise apply *Silkwood* in finding state remedies viable even where state regulation is foreclosed. Regulatory law, the Court has noted, does not serve the same purpose as tort law. The wooden contention that preemption of state regulation means preemption of all state action in an area, regardless of purpose, has been rejected.

It is precisely for this reason – that regulatory law and other forms of state law do not serve the same purpose – that every appellate court to consider the issue has held that Congress did not intent to preempt state criminal prosecution simply because state regulatory law was preempted in the occupational safety and health field. The Occupational Safety & Health Act, 29 U.S.C. §651 et seq. (1982), prescribes standards in the workplace and penalties for their violation, and although state criminal prosecutions may tend to “regulate” more stringently, criminal law also serves the distinct purpose of punishment. The words of the Illinois Supreme Court are representative:

Although the imposition of sanctions under State penal law may effect a regulation of behavior as OSHA safety standards do, regulation through deterrence, however, is not the sole purpose of criminal law. For example, it also serves to punish as a matter of retributive justice. Too, whereas OSHA standards apply only to specific hazards in the workplace, criminal law reaches to regulate conduct in society in general.

*People v. Chicago Magnet Wire Corp.*, 126 Ill.2d 356, 263, 534 N.E.2d 962, 966 (1989).<sup>2</sup>

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<sup>2</sup> See also *Sabine Consolidated, Inc. v. State*, 806 S.W.2d 503 (Tex. Crim. App. 1991); *People v. Pymm*, 76 N.Y.2d 511, 563 N.E.2d 1, 561 N.Y.S.2d 687 (1990); *People v. Hegedus*, 432 Mich. 598, 443 N.W.2d 127 (1989); *State ex rel. Cornellier v. Black*, 144

Similarly, tort law and regulatory law aim in different directions. Indeed, criminal law and regulatory law are much closer conceptually; there is intuitively a much greater conduct-forcing character to criminal law. Nonetheless, it operates independently to federal regulation in the OSHA arena. Surely it makes sense for Congress to preempt state regulatory law, while leaving compensation law intact.

**B. Regulatory Law Places Limits on the Operation of the Marketplace, while Tort Law is a Part of the Marketplace.**

The marketplace in which products are sold, consumed, and cause injury and death works essentially by internalizing external costs. Social costs of products are imposed on manufacturers. Among other ways this occurs, tort verdicts impose the costs of injuries caused by products, and of course the costs are in turn spread by manufacturers to all consumers.<sup>3</sup> Occasionally, of course,

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Wis.2d 745, 425 N.W.2d 21 (1988); *Commonwealth v. Morris*, 394 Pa. Super. 185, 575 A.2d 582 (1990). All of these rulings preserve state criminal power in the occupational safety and health field.

<sup>3</sup> We are speaking here of the product marketplace in general. It should be noted that the cigarette market in particular is eminently suited to the normal operation of risk-spreading. Noting that over 600 billion cigarettes are sold each year in the United States, providing almost \$30 billion in revenue, one commentator has written that "[t]here is no apparent reason to

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regulations are necessary to place limits on the operation of the marketplace, to ensure that a minimum level of safety is provided or make up for some perceived breakdown in market operations. See generally G. Calabresi, *The Costs of Accidents* 68-129 (1970).

When this happens, Congress might well see fit to prohibit conflicting regulations, because they would conflict with the collective choice made by it. Indeed, as the parties will detail, a number of state and local governments were contemplating cigarette warning requirements prior to the passage of the federal labeling act; an express aim of the act was and is maintenance of national uniformity.

It does not follow, however, that the inner workings of the marketplace itself would necessarily therefore be altered. State tort law – whether it imposes absolute liability for all injuries caused by a product, strict liability, or fault-based liability – reflects a local decision as to how, within prescribed limits, costs will be allocated by the market. The D.C. Circuit recognized as much when it held that a suit challenging the labeling on a pesticide was not preempted by the Federal Insecticide, Fungicide

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(Continued from previous page)

exempt cigarette manufacturers from their loss-spreading responsibilities. . . . Cigarette companies not only profit from the sale of an injury-causing product, but receive sufficient revenue from cigarette sales to enable them to pay substantial amounts of money for purposes of compensation." Ausness, *Cigarette Company Liability: Preemption, Public Policy, and Alternative Compensation Systems*, 39 Syracuse L.Rev. 897, 942-43 (1988).



& Rodenticide Act, which precludes states from imposing labeling "requirements":

Even if Chevron could not alter the [EPA-approved] label, Maryland could decide that, as between a manufacturer and an injured party, the manufacturer ought to bear the cost of compensating for those injuries that could have been prevented with a more detailed label than that approved by the EPA.

*Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1062 (1985).

Professor Ausness has written on the dichotomy between regulatory adjustment of the marketplace, and marketplace operation itself, as means of accident cost avoidance. He concludes that federal warning requirements do not preempt the general operation of market forces:

Specific deterrence mandates a particular choice determined by the legislature or an administrative agency. . . . This was the type of state activity the Federal Cigarette Labeling & Advertising Act expressly prohibited. On the other hand, strict products liability is a classic example of general deterrence. It relies on market forces, not governmental coercion, to influence manufacturer behavior. Because of this fundamental difference between specific and general deterrence, it is difficult to see how federal legislation that preempted acts of specific deterrence by the states would necessarily preempt general deterrence measures as well.

Ausness, *supra*, at 927.

Tort law is only one of many factors that operate in the marketplace. The holding below, however, invests tort

law with an external, regulatory quality. This view of tort law not only ignores the distinct roles played by regulatory law and torts, but it also ascribes far too much effect to verdicts. The Third Circuit did not discuss in its original opinion how, or to what extent, tort verdicts drive manufacturers' behavior so much as to become requirements; it merely conclusorily referred to their "regulatory effect." *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 187 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987), on remand, 893 F.2d 541 (3d Cir. 1990), *cert. granted*, \_\_\_ U.S. \_\_\_, 111 S.Ct. 1386 (1991). While product liability law does influence safety choices, however, it sends an extremely vague signal. Several factors combine to weaken the verdict "signal."

First, because compensation, rather than injury prevention, is the primary purpose of tort law, tort proceedings are not ordinarily structured to provide specific guidance to manufacturers on precisely how to alter their conduct. For example, in a typical failure to warn case, the jury is asked to decide whether the manufacturer's conduct was negligent; it is not asked to decide what the manufacturer should have said. Thus, even if the manufacturer wanted to give the jury verdict "regulatory effect," it would often have trouble doing so. This is, of course, even more true of those cases which are resolved without trial – over 90% of tort cases.

Second, even in those instances in which it is clear what action the jury believes the manufacturer should take, it is by no means clear that the manufacturer will actually take that action. Unfortunately, manufacturers

often maximize short-term profits and fail to take appropriate steps to protect the public, even when jury verdicts urge them to do otherwise.

It is simply not true, therefore, that tort claims automatically equal regulation in their effect. Cases years apart underscore the fact: 13 years ago, the Tenth Circuit upheld an award of \$650,000 to the plaintiffs in *Fox v. Ford Motor Co.*, 575 F.2d 774 (10th Cir. 1978), for deaths caused, inter alia, by Ford's failure to install rear seat shoulder harnesses. Ford paid the money and made no changes; it did not install these cheap safety devices in all of its cars. Instead, it continued to pay individual victims. See, e.g., *Garrett v. Ford Motor Co.*, 684 F.Supp. 407 (D. Md. 1987) (\$3.3 million verdict, reported in Wall St. J., Dec. 21, 1987 at 25).<sup>4</sup>

Especially given the stricture against basing preemption on "hypothetical or potential conflict," *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982), tort liability does not frustrate federal regulation. The most recent court to consider preemption in the tobacco situation recognized as much:

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<sup>4</sup> It is worth noting that, in the above example, the potential "regulatory effect" was much greater than in the instant case, because the "signal" was clear: Ford knew exactly why it had to pay the award and what it should do to avoid paying similar awards in the future. In the warnings area, by contrast, the jury simply decides whether the warning was inadequate, but sends no clear message about its content. In such a situation, "regulation" is hardest to discern.

In light of the manufacturers' options and the variables that influence their choices, it is simply not clear that common-law damage awards against cigarette manufacturers would result in the "diverse, nonuniform, and confusing cigarette labeling and advertising regulations" Congress sought to avoid through the Labeling Act. We conclude, therefore, that the potential conflict asserted by defendants is too speculative to warrant preemption.

*Carlisle v. Philip Morris, Inc.*, 805 S.W.2d 498, 510 (Tex. App. 1991). Verdicts compensate, but they do not control behavior nearly enough to amount to regulation.

There is a final aspect of tort law's role in the marketplace that underscores its distinction from regulatory law and the wisdom of Congress in preserving its operation. Federal statutory law is relatively slow to change; tort law and the marketplace are fluid, responding far more quickly to changing conditions. It was wise for Congress to leave tort law in place, even while enacting federal regulatory law and preempting its state counterpart. The operation of tort law, through the marketplace, creates a built-in self-correcting mechanism that may prompt manufacturers to change their conduct in response to verdicts or, if that is prohibited by federal law, join together to seek a change in that law. See *Ferebee, supra*, 736 F.2d at 1541 ("Successful actions [challenging labeling] may lead manufacturers to petition EPA to allow more detailed labeling of their products; alternatively, EPA itself may decide that revised labels are required in light of the new information that has been brought to its attention through common law suits.").

**C. Tort Law Accommodates the Visceral Problem of Liability in the Face of a Prescribed Warning.**

Congress required a particular warning on all packages of cigarettes. Much of the motivation for recent preemption holdings in the products liability area comes from the reaction that it is essentially unfair to impose liability for an inadequate warning in the face of a prescribed warning. Though that is in reality a tort argument, not a preemption argument – preemption has to do with Congress's intent – the contention makes its way into preemption holdings. Thus, in a very recent case, the Eleventh Circuit held that suits challenging pesticide labels are preempted by the Federal Insecticide, Fungicide & Rodenticide Act, 7 U.S.C. §§136-136y (FIFRA) as long as the labels meet FIFRA requirements. *Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991). One basis for the holding was the court's policy view, unsupported by any citation to that statute's language or legislative history, that a jury simply should not be permitted to disagree with the EPA as to whether a pesticide's label is adequate. The court baldly asserted that "a jury determination, via a state common law tort judgment, that a pesticide's labeling is inadequate results in a direct conflict with the EPA's determination that the labeling is adequate to protect against health risks." *Id.* at 1025.

*Papas* is only the most recent example of how judges' views of the merits of product liability claims infect preemption analysis. The same happens in cigarette cases. In *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987), in addressing the argument that preemption does not normally occur when its effect would be to leave injured parties without a remedy, the court stated that "[f]irst,

cigarette smoking, at least initially, is a voluntarily activity." *Id.*, 825 F.2d at 627. While such a view may have force, it plainly has nothing to do with preemption.

This Court should stop the conversion of preemption doctrine into tort policy doctrine. While it may be a very sympathetic argument, the contention that government acceptance (or prescription) of a particular label excludes a tort challenge has nothing to do with preemption. The bedrock issue of preemption is a balance of powers. Whether state tort law *can* challenge a federally-approved level is entirely separate from whether state tort law *should*.

At bottom, a defendant's complaint is that it cannot be found negligent for doing no more than what the government required it to do. Not only is this plea unrelated to preemption, but fortunately, tort law itself also accommodates the concern. There is no need to press preemption doctrine into service to accomplish what is really a tort policy.

It is axiomatic that compliance with government standards is admissible to prove nondefectiveness or reasonable care. *See, e.g., Cornstubble v. Ford Motor Co.*, 178 Ill. App. 3d 20, 532, N.E.2d 884 (1988). Some jurisdictions go further, however, and mandate that compliance with standards is a *conclusive* defense to tort liability, *see Montana Code Ann. §69-4-201* (1990), or that compliance establishes a rebuttable presumption of non-negligence. *Kan. Stat. Ann. §60-3304(a)*(1981); *Ky. Rev. Stat. Ann. §411.310(2)*(1978); *N.D. Cent. Code §28-01.1-05(3)*(1979); *Utah Code Ann. §78-15-6(3)*(1977); *Colo. Rev. Stat.*



§13-21-403 (1977). *See also* Model Uniform Product Liability Act §108(A).

Even when no presumptive or conclusive weight is given to compliance, the effect of adherence to minimum standards is, of course, very damaging to a tort claim. *See, e.g., Lorenz v. Celotex Corp.*, 896 F.2d 148 (5th Cir. 1990) (upholding instruction under Texas law that "compliance with government safety standards constitutes strong and substantial evidence that a product is not defective"); *Haynes v. American Motors Co.*, 691 F.2d 1268, 1274 (8th Cir. 1982) (upholding instruction that Ark. Stats. §34-2804(a), dictating that state compliance with federal regulations "shall be considered as evidence" of non-defectiveness, "provided a defense" to plaintiffs' claims).

In short, the visceral reluctance to impose liability in the face of the government warning is taken care of by tort doctrine. There is no need to use preemption doctrine to overcome this problem, and the Court should put a stop to the tendency. Preemption doctrine addresses the relations between Congress and the states. Tort law will take care of any fairness concerns.

### III. THE COURT SHOULD MAKE CLEAR THAT TORT LAW IS NOT PREEMPTED UNLESS CONGRESS CLEARLY AND UNEQUIVOCALLY SAID SO AND A PARALLEL REMEDY IS AVAILABLE.

#### A. Speculative, Incremental Tort Liability Pressure is an Insufficient Basis for Preemption.

The parties will detail the extensive precedent of this Court to the effect that speculative, potential conflict

between state and federal law will not result in preemption. *See, e.g., Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) ("The existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute.") In finding preemption, however, the Third Circuit relied on three cases for the proposition that tort law can equal regulation. These cases are vastly different and are distinguished below. We first will briefly discuss the recent holdings of this Court that, while federal regulation may displace state regulation, state compensation law is not preempted, at least absent an unequivocal declaration.

Foremost, of course, and impossible to reconcile with *Cipollone*, is *Silkwood v. Kerr-McGee Corp.*, *supra*. The parties will treat *Silkwood*, but the words of America's leading constitutional scholar bear repeating:

The Third Circuit [in *Cipollone I*], in reading Congress' preemption language expansively, apparently found that Congress meant to exempt the tobacco industry from the choice, faced by manufacturers in virtually every other industry, among increasing product safety, increasing warnings, or paying damages to injured consumers. That holding seems hard to square with *Silkwood* and with the Supreme Court's admonition that there is an overriding presumption that "Congress did not intend to displace state law."

L. Tribe, *American Constitutional Law* 490-91 (2d ed. 1988).

*Silkwood* guided the result in a recent case in which the Court explicitly acknowledged that "the prospect of compensatory and punitive damages for radiation-based

injuries will undoubtedly affect nuclear employers' primary decisions about radiological safety in the construction and operation of nuclear power facilities. . . . " and reaffirmed its "teaching that '[o]rdinarily, state causes of action are not preempted solely because they impose liability over and above that authorized by federal law.' " *English v. General Electric Co.*, \_\_\_ U.S. \_\_\_, \_\_\_, 110 S.Ct. 2270, 2279-80 (1990), quoting *California v. ARC America Corp.*, 490 U.S. 93, 105 (1989).

The same point was made in *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988), in language that anticipates the present case:

Congress' reluctance to allow direct state regulation of federal projects says little about whether Congress was likewise concerned with the incidental regulatory effects arising from the enforcement of a workers' compensation law, like Ohio's, that provides an additional award when the injury is caused by the breach of a safety regulation. The effects of direct regulation on the operation of federal projects are significantly more intrusive than the incidental regulatory effects of such an additional award provision. Appellant may choose to disregard Ohio safety regulations and simply pay an additional workers' compensation award if an employee's injury is caused by a safety violation. We believe Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not.

*Id.*, 486 U.S. at 185-86. Nonetheless, the Third Circuit strained to find preemption in indistinguishable circumstances.

*Silkwood* and its progeny teach that incidental pressure resulting from state compensation law does not rise to the level of "conflict" such that preemption obtains. These cases would seem to govern the present matter. The lower court relied on three very different cases, however, that properly viewed are inapposite.

Stating only that "several Supreme Court opinions reflect recognition of the regulatory effect of state law damage claims and their potential for frustrating congressional objectives," 789 F.2d at 187, the court first cited *Fidelity Federal Savings & Loan Assoc. v. de la Cuesta*, 458 U.S. 141, 156-59 (1982). *de la Cuesta* says nothing of the sort. There, federal law specifically empowered federal savings and loan associations, at their sole option, to include "due-on-sale" clauses in loan contracts, "subject only to express limitations imposed by the [Federal Home Loan Bank] Board." *Id.* at 155. California law required certain conditions to exist before such clauses could be used. *de la Cuesta* is a different case from the present one, then: there, state law specifically required what federal law disallowed: restrictions on the use of the clauses. Here, state law does not "require" anything (except perhaps, the payment of damages by a defendant that loses), and federal law has merely prohibited the states from ordering a stronger warning.

The more fundamental problem with reliance on *de la Cuesta* is that it says nothing about incremental tort liability pressure equaling regulation. "Regulatory effect" in *de la Cuesta* was not derived from damage claims, but rather from a specific state requirement which interfered with flexibility explicitly provided by federal law. The case simply does not discuss the hazy type of "conflict" at

issue here, and certainly provides no support – let alone any meaningful delineation of useful principle – for the “verdicts equal regulation” hypothesis.

The Third Circuit next cited *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 324-25 (1981). Once again, the case presents a very different conceptual framework. The Interstate Commerce Commission has the sole power to decide whether railroad tracks can be abandoned; an Iowa statute prescribed penalties for abandonment potentially even in the face of ICC authorization. *Carlisle v. Philip Morris, Inc.*, *supra*, 805 S.W.2d at 516, distinguishes *Kalo Brick* from the present situation, as the parties will undoubtedly discuss. What is important here is that like *de la Cuesta*, *Kalo Brick* affords no instruction on how verdicts can acquire the force of regulation: how many verdicts there must be, what kind and extent of effect on defendants’ income must be demonstrated, whether compensatory as well as punitive awards are to be considered, etc. *Kalo Brick* is a simple, pure conflict case: the federal agency had granted permission to do what state law would question. There was no occasion in that case to examine the regulatory pressure of damage claims, because the case presented a straightforward, not hypothetical conflict.

The last case cited was *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959), which has been used, quite cavalierly, by lower courts to work much unintended mischief outside of its narrow context. *Garmon* is distinct from *de la Cuesta* and *Kalo Brick* in that it does at least contain a statement that damage awards can have a regulatory effect. Nevertheless, the case, which

held that National Labor Relations Act provisions preempted an action for business losses from union picketing, is a thin reed upon which to base the elimination of tort remedies for defective products.

For one thing, preemption is presumed in cases in which the National Labor Relations Board is involved. *Brown v. Hotel & Restaurant Employees & Bartenders International Union Local 54*, 468 U.S. 491, 502 (1984); see *Dewey v. R. J. Reynolds Tobacco Co.*, 121 N.J. 69, 88, 577 A.2d 1239, 1248 (1990). The labor field contrasts with public health and safety, in which the presumption is against preemption. *Hillsborough County v. Automated Medical Laboratories, Inc.*, *supra*, 471 U.S. at 719.

Placing *Garmon* at a further remove is the fact that state jurisdiction was displaced, because the facts possible came under National Labor Relations Board purview: when “activity is arguably subject to section 7 or section 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.” *Garmon*, *supra*, 359 U.S. at 245. If the regulated matter is so demanding of sole supervision as to be “jurisdictionally-definable,” see *L. Tribe*, *supra* at 503, exclusion of state power seems natural. No one has ever contended that this is so with products liability law.

The preemption holding in *Garmon* has been narrowly applied in its own field. See, e.g., *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 302 (1977) (“[I]nflexible application of the [*Garmon*] doctrine is to be avoided, especially where the State has a substantial



interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme.""); *Breining v. Sheet Metal Workers International Assoc. Local Union No. 6*, 493 U.S. 67 (1989) (employee's suit against union for hiring-hall discrimination not preempted because courts have doctrinal expertise in fair representation matters and because the compensation interest is paramount and cannot be assured by the National Labor Relations Board). The opinion has had a second career, however, in the products liability area, as it has been used to justify preemption by lower courts in several cases – but the employment has come more through ritual incantation than reasoned application.

The transformation of *Garmon* into a wondrous shield against ordinary products liability claims began in the case below, with absolutely no analysis. The ritual language was repeated in *Palmer v. Liggett Group, Inc.*, *supra*, again with no analysis, or comparison of *Garmon*'s setting and the products liability setting. *Garmon* unfortunately lends a veneer of legitimacy to astonishing statements like that of Judge Brown:

If a manufacturer's warning that complies with the Act is found inadequate under a state tort theory, the damages awarded and verdict rendered against it can be viewed as state regulation: the decision effectively compels the manufacturer to alter its warning to conform to different state law requirement as "promulgated" by a jury's findings.

*Id.*, 825 F.2d at 627. It should not be necessary to respond that juries do not promulgate requirements, but *Garmon* has allowed such language to gain credence.

One year after *Palmer*, the First Circuit decided *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, \_\_\_ U.S. \_\_\_ (1990), in which it held that suits challenging the lack of airbags in cars are preempted. The court simply quoted the magic language, and also referred in a footnote to "the *Garmon* reasoning that tort suits have a regulatory effect." *Id.*, at 411 n.18. Similar use of *Garmon* was made in *Pennington v. Vistrion Corp.*, 876 F.2d 414, 420 (5th Cir. 1989) (holding tobacco warnings claims preempted and stating only that "state tort liability can have a regulatory effect that may conflict with a federal statute or frustrate congressional objectives. . . ."), and *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), in which the language conferring regulatory status on tort verdicts, which now is routinely recited in order to facilitate preemption, was relegated to a footnote. *Id.*, at 824 n.16.

The problem in these cases, and most certainly in the case under review, is that we are told nothing about the effect. How much effect? Does the "effect" come from suits being filed, from verdicts, from verdicts over a certain size, or from something else? Does it come only from punitive verdicts, or from compensatory ones as well?

Moreover, these cases seem to lose track of the fact that what is preempted is state "requirements." Even if financial effect is accorded to verdicts, such additional product costs simply do not equal a requirement – unless that word has lost all meaning.

In short, it is not enough simply to intone that verdicts equal regulation. If preemption is to be based on

"conflict" or "frustration" – and if the cases that hold against preemption based on speculative conflict really mean anything – we must know how the conflict occurs.

*Garmon* was not concerned with answering these questions, because preemption there took on a jurisdictional dimension: Congress had delegated to the NLRB exclusive cognizance of such labor disputes. In contrast, it is hard to imagine an area more traditionally state-managed than compensation for product injuries. *Garmon* simply does not tell us, in any meaningful articulation of decisional principle, how verdicts become requirements. This Court should restore the language of *Garmon* to its context, and undo the mischief caused by its careless application in the lower courts.

#### **B. Tort Law is Preempted Only When it Actually and Directly Conflicts with Federal Law.**

Instead of finding conflict in the gossamer "effect" of verdicts, state tort law should be deemed preempted only when it actually and directly conflicts with federal law. The sense of this case, at bottom, is that Congress merely required some minimum information to be imparted to cigarette purchasers. It is doubtful that Congress meant to *forbid* a manufacturer from putting a more detailed warning on a pack of cigarettes, much less to forbid the states from enforcing their general tort law principles to compensate cigarette victims. If tort law somehow precluded compliance with the minimum Congressional directive, it would then quite easily be preempted – but that is not this case.

The present case is the reverse situation. Here, a state jury would simply require a tobacco company to pay for the death its product caused, concluding that more information should have been passed on, but would not force any change in the product, its label, or its advertising, and certainly would not preclude compliance with the federal mandate. Or, perhaps the jury would conclude that the company had not been negligent, or that the minimum warning was adequate, because after all it was the warning Congress required. The point is that federal law would not be interfered with by whatever the jury does.

Refusing to base preemption on speculative conflict is not a novel approach; rather, it comports much more with traditional preemption analysis than do the recent transparent opinions in the products area. Insisting on real, certain conflict preserves the supremacy of the regulatory interests of Congress, but displaces state compensation functions only to the extent necessary to serve those interests.

In a larger view, requiring some actual conflict to be present preserves the correct balance of federal and state hegemony, and more fundamentally preserves the role of Congress in calibrating the balance. State governance is "more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 552 (1985). As Professor Tribe has written, *Garcia* dictates that "decisions restricting state sovereignty be made in a deliberate manner by Congress, through the explicit exercise of its lawmaking power to that end. . . . But to give

the state-displacing weight of federal law to mere Congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." L. Tribe, *supra* at 480 (emphasis in original).

Groping for preemption in the absence of Congressional dictates is an exercise which does not further these ends. This is especially so where the exercise is so clearly in the service of judges' policy views. The use of preemption as a surrogate for tort policy must cease.

In writing of the evolution, in another area, of doctrine away from its underlying policy, Professor Robertson has stated:

Legal doctrine always seeks to reflect and implement some governmental policy. It achieves its purposes when it is an accurate reflection of that policy and when it provides a readier basis for decision (or for explanation of decision) than the policy standing alone. But unless the underlying policy is kept firmly in mind and the developing doctrine continually checked against it, doctrine tends to proliferate and take on a life of its own.

Robertson, *A New Approach to Determining Seaman Status*, 64 Tex.L. Rev. 79, 84-85 (1985).<sup>5</sup>

<sup>5</sup> This Court cited the quoted article this term in *McDermott International, Inc. v. Wilander*, \_\_\_ U.S. \_\_\_, 111 S.Ct. 807, 112 L.Ed.2d 866, 882 (1991), in which the "confusion" caused by the "wayward case law" on seaman status was eliminated by returning the doctrine to its original motivating foundation: seaman's remedies should be accorded all those who face the particular perils of the sea in the service of vessels.

If the result below is upheld, it is hard to see where preemption stops. If it occurs in a traditionally state-governed field, based on speculation, and leaving no remedy, preemption will truly have taken on a life of its own.

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## CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

CHARLES S. SIEGEL  
(Counsel of Record)  
BARON & BUDD, P.C.  
8333 Douglas Avenue  
Tenth Floor  
Dallas, Texas 75225  
(214) 369-3605

ARTHUR BRYANT  
PRISCILLA BUDEIRI  
TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C.  
1625 Massachusetts Avenue, N.W.  
Suite 100  
Washington, D.C. 20036  
(202) 797-8600

*Attorneys for Amicus Curiae  
Trial Lawyers for Public Justice*



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No. 90-1038

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

THOMAS CIPOLLONE,  
*Petitioner,*

v.

LIGGETT GROUP, INC., PHILIP MORRIS INC.,  
and LOEW'S THEATRES, INC.,  
*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Third Circuit

BRIEF OF THE  
NATIONAL LEAGUE OF CITIES,  
NATIONAL CONFERENCE OF STATE LEGISLATURES,  
NATIONAL ASSOCIATION OF COUNTIES,  
COUNCIL OF STATE GOVERNMENTS,  
INTERNATIONAL CITY MANAGEMENT ASSOCIATION,  
AND U.S. CONFERENCE OF MAYORS  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

RICHARD RUDA \*  
Chief Counsel  
CHRISTINE DESAN HUSSON  
STATE AND LOCAL LEGAL CENTER  
444 North Capitol Street, N.W.  
Suite 349  
Washington, D.C. 20001  
(202) 638-1445

\* *Counsel of Record for the*  
*Amici Curiae*

### QUESTION PRESENTED

Whether the Federal Cigarette Labeling and Advertising Act (FCLA), 15 U.S.C. 1331-1341, preempts common law claims based on failure to warn by cigarette manufacturers who labeled their packages in compliance with the FCLA, or based on misrepresentation, breach of warranty, or conspiracy to defraud in the content of their cigarette advertising.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

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No. 90-1038

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THOMAS CIPOLLONE,  
*Petitioner,*

v.

LIGGETT GROUP, INC., PHILIP MORRIS INC.,  
and LOEW'S THEATRES, INC.,  
*Respondents.*

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On Writ of Certiorari to the  
United States Court of Appeals  
for the Third Circuit

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BRIEF OF THE  
NATIONAL LEAGUE OF CITIES,  
NATIONAL CONFERENCE OF STATE LEGISLATURES,  
NATIONAL ASSOCIATION OF COUNTIES,  
COUNCIL OF STATE GOVERNMENTS,  
INTERNATIONAL CITY MANAGEMENT ASSOCIATION,  
AND U.S. CONFERENCE OF MAYORS  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

---

**INTEREST OF THE *AMICI CURIAE***

*Amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a manifest interest in legal



issues that affect state and local governments. This case presents questions that lie at the core of *amici*'s interests: the relationship between a federal statute and state common law.

The court of appeals held that state tort law—law integral to the state's police powers over matters pertaining to health and safety—is preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331-1341. This holding has profound importance for the States and their citizenry since it drastically limits the tort remedies available to persons injured by the practices of an industry. *Amici* accordingly submit this brief to assist the Court in the resolution of this case.<sup>1</sup>

### STATEMENT

The court of appeals held that the Federal Cigarette Labeling and Advertising Act (FCLA), 15 U.S.C. 1331-1341, preempts petitioner's state law claims for failure to warn, breach of express warranty, fraudulent misrepresentation, and conspiracy to defraud insofar as they challenge advertising, promotional, and public relations activities of the respondents after 1965. See Pet. App. 17a-18a, 88a-90a. *Amici* adopt petitioner's statement of the case.

### INTRODUCTION AND SUMMARY OF ARGUMENT

Under any of its guises—express, field, or conflict—the preemption analysis in this case includes two inquiries. The Court must determine, first, whether Section 5(a) of the Federal Cigarette Labeling and Advertising Act, Pub.L. No. 89-92, Sec. 5(a), 79 Stat. 283 (1965), 15 U.S.C. 1334(a), preempts state law failure to warn claims, *i.e.*, claims based on the obligation of a seller or manufacturer adequately to inform purchasers about the possible hazards of a product. Such

<sup>1</sup> The parties' letters of consent have been filed with the clerk pursuant to Rule 37.3 of this Court.

claims implicate packaging of cigarettes: it is through cautionary information or warnings on or in packages that manufacturers generally meet their common law duties to warn purchasers. The FCLA decrees that a federal warning label be placed on all cigarette packages, and, in Section 5(a), it prohibits other authorities from requiring other "statements" on cigarette packages. This Court must decide whether, by prohibiting authorities from requiring "statements" on cigarette packages, Section 5(a) was intended to prevent the operation of state tort law to impose common law duties to warn.

Second, the Court must determine whether Section 5(b) of the FCLA, 15 U.S.C. 1334(b), preempts state common law claims based on obligations to convey information truthfully. The 1965 Act prohibited authorities from requiring a "statement" in cigarette advertising by manufacturers whose cigarette packages were properly labeled. See 15 U.S.C. 1334(b) (1964 ed. & Supp. I). The question is whether that prohibition on requiring a "statement" in advertising was intended to stop the operation of the Common Law to impose duties on cigarette manufacturers to avoid misrepresentation, breach of warranty, and conspiracy to defraud. In addition, the Section 5(b) question has a second stage, since Congress amended the language of the section in 1969. See Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 88. Since that time, Section 5(b) has precluded authorities from "impos[ing] under State law" any "requirement or prohibition based on smoking and health" on cigarette advertising and promotion. 15 U.S.C. 1334(b). The question concerning Section 5(b) post-1969, then, is whether by precluding authorities from imposing under State law any "requirement or prohibition based on smoking and health," Section 5(b) was intended to preclude the operation of tort law to impose on cigarette advertisers common law duties based on the obligation to convey information truthfully.

The answer to both the Section 5(a) and the Section 5(b) inquiries is the same: Congress did not intend to preempt state tort law. Rather, Congress intended to preclude state and local legislatures and agencies from promulgating diverse and conflicting rules concerning warning labels on packages and in advertising, as well as (post-1969) differing prohibitions on cigarette advertising based on health concerns.

Application of this Court's preemption doctrine dictates this conclusion. First, the FCLA does not expressly preempt state tort law. That common law system is not specified in the Act, nor are the terms used in the Act generally used to refer to tort law.

Second, the FCLA does not impliedly preempt state tort law by occupying the field. As its language reveals, the reach of the Act is precise: Congress intended to determine only whether and what statutory warning label should attach to cigarette packages and advertisements (and, post-1969, what statutory requirements or prohibitions based on smoking and health could be imposed on advertising). The legislative history unmistakably underscores Congress's intent. Thus the record makes clear that the legislators assumed, indeed premised their action upon, the continued functioning of state tort law. They did not change that premise in 1969, when they made certain changes to Section 5(b) without any intent to add a preemption of state tort law to the Act. Other aspects of the statutory scheme confirm the statute's discrete scope: the Act does not seek pervasively to regulate any area, nor does it include remedial provisions to compensate those injured by smoking.

Nor is state law preempted as conflicting with the FCLA, as is made clear by examining the effect state tort law would have on the accomplishment of the objectives of the federal Act. Tort obligations impose a duty on a manufacturer, which the manufacturer can meet in any number of ways. Because the manufacturer need not select the one method—adding a “statement” to a cigarette package or advertising—that the FCLA precludes

States from requiring, the imposition of the tort obligation does not conflict with the Act. That is true *a fortiori* in this case, where Congress afforded respondents the opportunity to influence the strength of the federal warning.

Ultimately, even if there is tension between the operation of state tort law and the objectives of the FCLA, it is a tension Congress intended to tolerate. Thus, Section 2 of the Act, current version at 15 U.S.C. 1331, makes clear that warning the public is the Act's primary objective. Because state tort laws reinforce that objective, their operation cannot be preempted on the ground that they diminish achievement of the Act's secondary objective of protecting the economy.

## ARGUMENT

### THE FEDERAL CIGARETTE LABELING AND ADVERTISING ACT DOES NOT PREEMPT STATE LAW TORT CLAIMS BASED ON A FAILURE TO WARN BY MANUFACTURERS OR BASED ON MISREPRESENTATION, BREACH OF WARRANTY, OR CONSPIRACY TO DEFRAUD IN THE CONTENT OF THEIR CIGARETTE ADVERTISING

Federal law preempts state law under the Supremacy Clause, U.S. Const. Art. VI, cl.2, in three circumstances. First, Congress may explicitly direct when and to what extent its enactment preempts state law. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Second, state law is preempted even in the absence of an express statutory directive, if “it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.” *English v. General Electric Co.*, 110 S.Ct. 2270, 2275 (1990). Finally, “state law is preempted to the extent that it actually conflicts with federal law.” *Id.*

In each case, preemption remains “fundamentally . . . a question of congressional intent.” *English*, 110 S.Ct. at 2275. And in each case, that inquiry is informed by the



"presuppositions of our embracing federal system," including the principle that democracy is promoted by the "diffusion of power." *San Diego Unions v. Garmon*, 359 U.S. 236, 243 (1959). Thus, respondents must overcome the presumption that Congress did not intend to preempt state law in areas, such as health and safety, see *Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 715 (1985), that are traditionally regulated by the States. See *California v. ARC America Corp.*, 109 S.Ct. 1661, 1665 (1989). Rather, when Congress legislates in such an area, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). No matter by which preemption standard the present case is judged, respondents can make no such demonstration.

#### I. The FCLA Does Not Expressly Preempt State Tort Law

There is no language in the FCLA that expressly preempts petitioner's common law claims. To the contrary, the language of the Act indicates that Congress intended to preempt only legislative and executive rulemaking—including promulgation of statutes, regulations, ordinances, and rules—by state and local legislatures and agencies.

A. The court of appeals held that Congress preempted state common law tort claims in 1965 when it enacted the FCLA. Pet. App. 88a-90a. Section 4 of the Act, 15 U.S.C. 1333 (1964 ed. & Supp. I), required that all cigarette packages bear the warning statement "Caution: Cigarette Smoking May Be Hazardous to Your Health." The preemption provision of the Act, Section 5, provided as passed:

(a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.

(b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

15 U.S.C. 1334 (1964 ed. & Supp. I).

The language of Section 5 makes no reference to state tort law. Rather, on its face, it prohibits a narrow circumstance: it precludes any authority from "requir[ing]" a "statement" relating to smoking and health on either a cigarette package or in cigarette advertising. If Congress, by referring to a State "requir[ing]" a "statement," meant to identify state tort law, it failed notably. Indeed, given the assumption that "the ordinary meaning accurately expresses the legislative purpose," *FMC Corp. v. Holliday*, 111 S.Ct. 403, 407 (1990) (quoting *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985)), Congress's terminology indicates instead that the legislature mean to preempt only legislative and executive rulemaking by states and localities.

First, while tort law may have "regulatory effects"—that is, it may influence behavior, see *Garmon*, 359 U.S. at 246-247,—it does so by inducing compliance through financial incentives or disincentives, not by "requiring" specific action. By contrast, "to require" an action means "[t]o demand," "insist upon," "command," or "order" it. *The American Heritage Dictionary* 1105 (W. Morris ed.) (1969). Conventionally, a State is said to "require" or "order" certain action, if it directly enforces that command by fine, injunction, or criminal prohibition. Tort law, however, depends on the initiative of private parties. They, not the State, invoke it as a state-sponsored way to resolve disputes. See W. Keeton *et al.*, *The Law of Torts* 7 (5th ed. 1984).

Moreover, it would be anomalous to refer to the complicated, graduated, and flexible system that is the Common Law as requiring, in specific, a "statement." There



are many ways of meeting common law duties; statements are only one method of meeting a duty to disclose.<sup>2</sup>

The language of a related provision of the Act confirms this reading. Referring to the preemption section (Sec. 5), the Act's declaration of policy provision expressly notes that commerce and the national economy are not to be "impeded by diverse, nonuniform, and confusing cigarette labeling and advertising *regulations*." See Section 2(2), 15 U.S.C. 1331(2) (emphasis added). The use of the term "regulations" rather than "regulatory activity" or even the collective "regulation" betrays Congress's intent to reach specific regulatory enactments rather than state common law that may have incidental regulatory effect.

2. In order to defend the court of appeals' judgment, respondents must demonstrate that the language of the 1965 Act, as opposed to later versions, accomplishes the preemption of petitioner's state tort claims. Indeed, given the continuity of purpose and the similarity of language between the 1965 Act and the Act as amended by the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87, it would be difficult to maintain that Congress reversed itself and preempted state tort law in the 1969 Act. In any event, there is no basis for asserting that the language of the later Act explicitly preempts state tort law.

First, Congress retained the language of Section 5(a), 15 U.S.C. 1334(a), verbatim, thus securing the continued survival of failure to warn claims. Those claims are based on the duty to inform that a seller owes a purchaser.

<sup>2</sup> The reference to a "statement" on a package or in advertising, apparently as a method of disclosure, would be especially anomalous for common law claims other than failure to warn. The existence of any prescribed statement on a package or in advertising may have little relevance for claims like breach of warranty, misrepresentation, and fraud.

See Restatement (Second) of Torts § 401 (1965). Those claims are thus the ones implicated by restrictions placed on packaging. As reviewed above, under Section 5(a) they survive independent of claims depending on obligations attaching to the advertising or promotion of the product.<sup>3</sup>

In 1969, Congress did amend Section 5(b), concerning statements in advertising, to read:

No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Pub. L. No. 91-222, 84 Stat. 88, 15 U.S.C. 1334(b). In its amendment, Congress declined once again explicitly to identify tort suits. Nor did it accomplish as much by adjusting the preempting language of Section 5(b) to include any "requirement or prohibition" based on smoking and health. A "prohibition," like a requirement, generally signifies an order that only the State can enforce. See *The American Heritage Dictionary, supra*, at 1046 (defining "prohibition" as "the act" of "forbid[ding] by authority," of "prevent[ing] or debar[ring]"). It is an alien way to refer to tort law, in which the State has ceded the ability to prosecute noncompliance to private parties.<sup>4</sup>

Congress also added to Section 5(b) the phrase "imposed under State law," but the addition has little sig-

<sup>3</sup> Failure to warn claims need not assert an affirmative duty on a manufacturer to disclose a hazard in advertising or promotion, a communication that reaches a wide audience of potential customers. Rather, failure to warn claims turn on the manufacturer's duty to disclose information to those who have already purchased a product. See Restatement (Second) of Torts § 401.

<sup>4</sup> *Amici* note that in the 1988 codification of the Act, Section 5(b), 15 U.S.C. 1334(b), is captioned "State regulations," reflecting a conventional understanding of the section's terminology.

nificance in the preemption inquiry. The structure of the rest of the statute makes clear the purpose and meaning of the reference: in 1969, Congress determined to treat prescriptions on advertising imposed by state legislatures and agencies separately from prescriptions imposed by the relevant federal regulatory agency, the FTC. The 1965 Act had preempted both by the same provision (*see* Sec. 5(b)) until the same date (*see* Sec. 10, 15 U.S.C. 1339 (1964 ed. & Supp. I)). In 1969, Congress wished to preempt regulatory enactments by States indefinitely (*see* Sec. 5(b) as amended; 15 U.S.C. 1334 (Effective Date note)), while preempting regulatory action by the FTC only until July 1, 1971 (*see* Sec. 7; 15 U.S.C. 1336 (1970 ed.)). Congress also left unchanged Section 2(2), with its reference to "diverse, nonuniform, and confusing cigarette labeling and advertising regulations." In short, Congress used precisely the language it would be expected to use to preempt the only laws it had in mind: directives enacted or issued by state and local legislatures and agencies to require warning labels on packages or in advertising.

## II. The FCLA Does Not Impliedly Preempt State Tort Law

Where Congress has not expressly preempted state law, this Court decrees its suppression only when the Constitution leaves no choice. The doctrine of implied preemption, by whatever name or formulation, *see Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), thus depends essentially on a finding that federal and state law simply cannot coexist. That finding is required if a regime of dual sovereigns, each of which is separately responsible for meeting distinct needs of the citizenry, is to function successfully. Needless invalidation of state law not only arrogates power to the central government, *see Garmon*, 359 U.S. at 243, it also leaves certain real needs—previously tended by state and local governments—unmet. *See, e.g., Pacific Gas & Electric Co. v. State Energy Resources Conserv. & Devl. Commn.*, 461 U.S. 190, 207-208 (1983).

A holding that state law is preempted in this case would be especially difficult since Congress deliberately considered the preemptive scope of the Act in Section 5, and nevertheless gave no indication that state tort law was incompatible with the federal statute. *See California Federal Savings & Loan Assoc. v. Guerra*, 479 U.S. 272, 282 (1987); *California Coastal Comm. v. Granite Rock Co.*, 480 U.S. 572, 591 (1987). State tort law, the product of generations of judicial development and a basic component of the police power of the state, is not the type of state law that Congress, focusing on the very issue of preemption, could easily overlook. *See Goodyear Atomic Corp. v. Miller*, 108 S.Ct. 1704, 1711-1712 (1988) (Congress presumed "knowledgeable about existing law pertinent to the legislation it enacts"). Indeed, application of this Court's implied preemption doctrine demonstrates that Congress intended the FCLA to coexist, as it comfortably can, with state tort law.

### A. Congress Did Not Intend The FCLA To Regulate Conduct In The Same Field As State Tort Law

Absent express preemption, state law is preempted if "it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *English*, 110 S.Ct. at 2275. Such intent may be inferred if "[t]he scheme of federal regulation . . . [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" or "the Act of Congress . . . touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state law on the same subject." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also Hillsborough County*, 471 U.S. at 713.

To discover the boundaries of the field that Congress intended to occupy exclusively when it passed the FCLA, "we look to the federal statute, read in the light of its



constitutional setting and its legislative history.'"<sup>5</sup> *De Canas v. Bica*, 424 U.S. 351, 360 n.8 (1976) (quoting *Hines*, 312 U.S. at 78-79 (Stone, J., dissenting)).

1. As the language analyzed above makes clear, Congress meant to control completely two discrete fields when it enacted the FCLA in 1965. In Section 5(a), it meant to proscribe any authority from "requir[ing] a "statement relating to smoking and health [other than the federal label] . . . on any cigarette *package*." In Section 5(b), Congress meant to proscribe any authority from "requir[ing]" a like "statement . . . in the *advertising* of any cigarettes" that bore the federal label. See 15 U.S.C. 1334(a), (b) (1964 ed. & Supp. I) (emphasis added).

By pairing its prohibitions with the requirement that a federal warning label be placed on all cigarette packages and not in cigarette advertising, Congress *did* mean to "establish a comprehensive Federal program" (Sec. 2, 15 U.S.C. 1331)—a program to forestall all similar such judgments by state legislatures and agencies. Those bodies frequently act to require statutory warnings in appropriate cases. But such actions do not without more immunize manufacturers from existing tort obligations. See Restatement (Second) of Torts § 288C (1965) ("Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions."); see also Model Uniform Products Liability Act, Sec. 108, 44 Fed. Reg. 62,730-62,731 (1979).

<sup>5</sup> "Little aid can be derived from the vague and illusory but often repeated formula that Congress 'by occupying the field' has excluded from it all state legislation. Every Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution." *De Canas*, 424 U.S. at 360 n.8 (quoting *Hines*, 312 U.S. at 78-79 (Stone, J., dissenting)).

Rather, a statutory warning requirement supplements existing tort law by assuring warning without reliance on the tort law's system of incentives to meet duties of due care.

In this case, Congress acted nationally for all the state legislatures, and it meant to act in the same manner they generally do—imposing a statutory warning requirement without displacing existing tort law. Thus Congress chose language that stopped interference with its labeling decision by state legislatures and agencies ("No statement . . . shall be required . . ."), rather than language that would arguably have gone beyond that result to stop the functioning of the Common Law (*e.g.*, "The manufacturer shall have no additional duty to warn . . .").

The focused nature of Congress's action is made especially clear in Section 5(b) of the 1965 Act. That section, proscribing authorities from requiring different cautionary "statement[s]" in advertising, is clearly irrelevant to other common law tort claims—such as express or implied warranty, negligent or intentional misrepresentation, or conspiracy to defraud—that may turn on the content of advertising. That is, the provision in no way precludes a State from policing universally applicable duties that are unrelated to the presence (or absence) of a particular warning statement. Indeed, as we explain below (*see pp. 17-19, 28, infra*), even the language of Section 5(b) adopted by Congress in the 1969 Act, forbidding the imposition under state law of any "requirement or prohibition *based on* smoking and health," leaves untouched common law requirements *based on* obligations to present information truthfully, to fulfill warranty claims, and to refrain from fraudulent activity.

2. The legislative history of the Act confirms the precise nature of the statute's reach. The catalyst for the enactment of the FCLA, and indeed for dramatically heightening the controversy over the health effects of



smoking, was the publication of the Report of the Surgeon General's Advisory Committee on Smoking and Health on January 11, 1964. See *Cigarette Labeling and Advertising: Hearings on S. 559 and S. 547 Before the Senate Comm. on Commerce*, 89th Cong., 1st Sess. Part 2 (1965) [hereafter *1965 Senate Hearings*]; H.R. Rep. No. 449, 89th Cong., 1st Sess. 2-3 (1965); S. Rep. No. 195, 89th Cong., 1st Sess. 2-4 (1965). The Report's conclusion that cigarette smoking was a health hazard sufficient to warrant "appropriate remedial action" elicited an immediate response from the FTC: the Commission issued a notice of proposed rulemaking to require a stringent federal warning label both on cigarette packages and in cigarette advertising. H.R. Rep. No. 449, *supra*, at 2; S. Rep. No. 195, *supra*, at 4; see also *id.*, at 14-17 (letter from Paul Dixon, Chair, FTC).

Against this background, Congress determined to take action for several reasons. It recognized first that protection of public health required the federal government, "upon which persons have come to rely for cautionary labeling of hazardous substances," to take affirmative action that would "manifest its concern." H.R. Rep. No. 449, *supra*, at 3. In addition, Congress wanted to forestall the "chaotic marketing conditions and consumer confusion" that would occur if state and local governments began passing "a multiplicity of . . . regulations" in response to the Surgeon General's Report. *Id.* at 4; see also, *e.g.*, 111 Cong. Rec. 13,893 (1965) (Statement of Sen. Magnuson). Finally, Congress acted quickly to reserve the federal labeling decision, which the FTC was demonstrably willing to make, to itself. See, *e.g.*, *id.* at 14,408-14,409 (Statement of Rep. Harris); *id.* at 14,413 (Statement of sponsor, Rep. Rogers).

In the FCLA, Congress targeted precisely the problems it perceived. First, Congress made the labeling decision: it determined that a statutorily prescribed label should be placed on cigarette packages, but not in cigarette ad-

vertising. And, Congress kept state bodies and the FTC from second-guessing its determination: the language of Section 5 prohibited either state governments or the FTC from requiring different labels on cigarette packages or in advertising.

The precision of Congress's aim is amply reflected in the record of its action. Thus the debates are replete with references making it clear that Congress was concerned with state action by "legislative and health authorities," 111 Cong. Rec. 13,929 (1965) (Statement of Sen. Neuberger), and other "State and local agencies," *id.* at 13,930 (Statement of Sen. Morton), not state judges.<sup>6</sup>

Congress's debate concerning the labeling requirement itself is similarly revealing. The decision to require a label on cigarette *packages* was made essentially without controversy—itself an indication that Congress did not intend its label to effect so dramatic a change as the

<sup>6</sup> See, *e.g.*, statements at 111 Cong. Rec. 13,893 (1965) (Sen. Magnuson) ("regulations"); *id.* at 13,901 (Sen. Moss) ("regulations"); *id.* at 13,911 (Sen. Cooper) ("State and local bodies"); *id.* at 13,930 (Rep. Morton) ("State and local agencies" and "laws"); *id.* at 14,410 (Rep. Springer) ("legislation," "statutes"); *id.* at 14,414 (Rep. Nelsen) ("50 different state labels," "50 different States"); *id.* at 14,419 (Rep. Cooley) ("legislat[ion]"); *id.* (Rep. Ottinger) ("enact[ment]"). Indeed, these same statements generally refer to the problems that will be presented when state or local authorities begin acting in the area—references to future action that would hardly apply to the common law system already in place.

Even occasional claims that the Act will "absolute[ly] preempt" States from taking action contain language revealing that the "absolute preemption" referred only to completely preventing actions by state and local legislatures or agencies. See, *e.g.*, H.R. Rep. No. 449, *supra*, at 20-21 (Min. Views); 111 Cong. Rec. 14,419 (1965) (Statement of Rep. Ottinger); *id.* at 16,542-16,543 (Statement of Rep. Moss).

displacement of state tort law. The focus of congressional debate was instead whether requiring a label in advertising was contrary to "the American principle of free enterprise and freedom of choice" because it made the medium "self-defeating."<sup>7</sup> *Cigarette Labeling and Advertising—1965: Hearings on H.R. 2248, H.R. 3014, H.R. 4007, H.R. 7051, and 4244 Before the House Comm. on Interstate and Foreign Commerce 364* (1965) [hereafter *1965 House Hearings*] (Statement of Rep. Kornegay). Ultimately, Congress determined that:

Considering the combined impact of voluntary limitations on advertising, the extensive smoking education campaigns [sic] now underway, and the compulsory warning on the package . . . no warning in cigarette advertising should be required pending the showing that these vigorous, but less drastic, steps have not adequately alerted the public.

S. Rep. No. 195, *supra*, at 5; see also H.R. Rep. No. 449, *supra*, at 4. That is, Congress determined to delay requiring a warning statement in advertising precisely because of its desire to avoid intruding any further than necessary into the relation between cigarette manufacturers and consumers.

But tort law is itself an element of the very relation between seller and buyer that Congress sought to leave undisturbed. Indeed, the record demonstrates unequivocally that Congress legislated on this premise. Thus, the members of Congress do discuss tort law during the

<sup>7</sup> Compare, e.g., 111 Cong. Rec. 13,929 (1965) (Statement of Sen. Neuberger); *id.* at 14,411 (Statement of Rep. Harris); *Cigarette Labeling and Advertising—1965: Hearings on H.R. 2248, H.R. 3014, H.R. 4007, H.R. 7051, and H.R. 4244 Before the House Comm. on Interstate and Foreign Commerce 105* (1965) (Statement of Rep. Pickle), with statements at, e.g., 111 Cong. Rec. 13,929 (1965) (Sen. Neuberger); *1965 House Hearings, supra*, at 358-365 (Wm. Crissy, Prof. of Marketing, Mich. State Univ.); *1965 Senate Hearings, supra*, at 130-131 (Emerson Foote, Chair, Nat'l Interagency Council on Smoking & Health).

debates—but in order to consider how the warning required by the FCLA might affect the merits of tort claims. For example, shortly before adoption of the conference report in the House, Representative Fascell noted that the FCLA "in no way affects the right to raise the defense of 'assumption or [sic] risk' . . . nor does it shift the burden of proof, nor could it be considered a legal or factual bar to the plaintiff user." 111 Cong. Rec. 16,543-16,544 (1965).<sup>8</sup> Congress's decision to minimize disrupting the relation between manufacturers and consumers cannot be parlayed into the antithetical conclusion that Congress intended to suppress all state tort law.

Nor did Congress change course in 1969, when it amended Section 5(b) to preclude any "requirement or prohibition based on smoking and health" from being "imposed under State law" on cigarette advertising or promotion. Congress re-examined the Act shortly before the three-year term of Section 5(b) (Section 5(a) had no termination date) was to expire. The legislature found undiminished the federal regulatory effort to control cigarette advertising. The FCC, which had applied its Fairness Doctrine to require public service "anti-smoking" announcements, now announced plans to ban all advertising from television and radio. The FTC announced its intention to resume proposed rulemaking to require health warnings in advertising. See H.R. Rep. No. 289, 91st Cong., 1st Sess. 3-4 (1969); S. Rep. No. 566, 91st Cong., 1st Sess. 6-8 (1969).

<sup>8</sup> Similarly, H.E.W. Acting Assistant General Counsel Theodore Ellenbogen testified during the hearings that products liability would "be a private matter and would not be regulated by the bill"; the agency also submitted a supporting legal memorandum. *1965 House Hearings, supra*, at 176-178. See also 111 Cong. Rec. 16,545 (1965) (Statement of Rep. Fascell) (noting that warning may aid plaintiff by demonstrating defendant's knowledge of hazard); *id.* at 16,546 (Statement of Rep. Udall) (referring to assumption of risk defense); *1965 House Hearings, supra*, at 422 (Statement of Paul Dixon, Chair, FTC) (similar).



The original House bill, H.R. 6543, 91st Cong., 1st Sess., simply extended the expiration date for Section 5(b), on the assumption that the existing language of the section would prevent the "intrusion" planned by the FCC and the FTC, and similar action by the States. See H.R. Rep. No. 289, *supra*, at 3-5; *id.* at 31 (Min. Views). In fact, however, the question whether the language of the 1965 Act actually prohibited a ban on advertising was hotly contested.<sup>9</sup> The Senate also debated a new development in the saga of the federal regulatory effort. After passage of the House bill, the cigarette industry responded to the FCC's calls for a prohibition on advertising by announcing a willingness voluntarily to terminate broadcast advertising. S. Rep. No. 566, *supra*, at 8-10. In response, the FTC agreed to suspend its rulemaking proceedings until at least July 1, 1971.

Congress amended Section 5(b) in light of these events. It tailored the Act to the new federal regulatory picture by limiting Section 5(b) to "State law" while detailing the limits on FTC authority in a new Section 7. See Sec. 7, as added by Pub.L. No. 91-222, 84 Stat. 89 (1970); S. Rep. No. 566, *supra*, at 12; see also Sec. 6, as added by Pub.L. No. 91-222, 84 Stat. 89 (1970) (formalizing the withdrawal of cigarette advertising from the broadcast media as a prohibition on such advertising).<sup>10</sup> While it had become unnecessary to explicate the limits on the FCC's authority to prohibit broadcast advertising, Congress moved to

<sup>9</sup> See, e.g., statements at 115 Cong. Rec. 16,169-16,170 (1969) (Rep. Eckhardt); *id.* at 16,288-16,289 (same); *id.* at 16,174, 16,176 (Rep. Adams); *id.* at 16,300 (Rep. Broyhill); *id.* at 16,290-16,291 (Reps. Koch, Fountain).

<sup>10</sup> Congress also defined the term "State" in the Act to include "any political division of any State." See 15 U.S.C. 1332(3). The amendment was meant to clarify that the Act's preemption "is intended to include not only action by State statute but by all other administrative actions or local ordinances or regulations by any political subdivision of any State." S. Rep. No. 566, *supra*, at 12. Again, mention of state judges is conspicuously absent.

dispel the lingering dispute over the ability of state governments to ban advertising altogether or in part. The legislature amended Section 5(b) to specify that the States could impose "[n]o requirement or prohibition" on advertising or promotion "based on smoking and health." Emphasis added. As the Senate report clarified, the preemption was narrowly restricted to requirements or prohibitions "based on smoking and health" so as not to affect State power to regulate cigarette sales, taxation, or smoking on other bases. S. Rep. No. 566, *supra*, at 12.<sup>11</sup>

Thus Congress in 1969 amended the FCLA for reasons that had nothing to do with state tort law, and without any intention to disturb the operation of that law. To the contrary, the legislators' pervasive assumption was that "nowhere in the act of 1965 does it preclude an individual . . . from pursuing a common-law liability [claim] against any tobacco company." *Cigarette Labeling and Advertising—1969: Hearings on H.R. 643, H.R. 1237, H.R. 3055, and H.R. 6543 Before the House Comm. on Interstate and Foreign Commerce, 91st Cong., 1st Sess. 579 (1969) [hereafter 1969 House Hearings]* (Statement of Rep. Watson): Thus, their sole concern about state tort law was whether a more stringent federal warning label, see Sec. 4, as amended, 15 U.S.C. 1330 (1970 ed.), might strengthen the tobacco companies' assumption of the risk defense.<sup>12</sup>

<sup>11</sup> In fact, the amendment originally referred to requirements or prohibitions "imposed by any State statute or regulation." 115 Cong. Rec. 38,732 (1969). It was rephrased in Conference as part of a "minor technical amendment[]." 116 Cong. Rec. 6628 (1970).

<sup>12</sup> See 115 Cong. Rec. 16,179 (1969) (Statements of Rep. Moss) (criticizing bill for relieving industry "of a major part of its liability" because smoker will be held to have had "fair warning"); *id.* at 16,278, 16,285 (1969) (similar); *id.* at 37,742 (Statement of Sen. Baker) (apparently suggesting that federal statement of hazard could create tort liability for manufacturer); *id.* at 38,749-39,750 (Exchange between Reps. Cotton and Moss) (concerning effect of label on assumption of the risk defense);



3. The structure of the statute completes the evidence that Congress meant the federal government to be the sole authority in two discrete fields: (1) prescribing the warning label placed on cigarette packages, and (2) determining what warning requirements or prohibitions based on smoking and health should attach to advertising. Thus the statute attempts no significant regulation of the cigarette industry.<sup>13</sup> Compare, e.g., *Hillsborough County*, 471 U.S. at 716-718 (rejecting more comprehensive federal regulation as insufficient to imply preemption). Nor does the Act appoint an administrative agency to administer any regulatory program. Compare, e.g., *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 319-324 (1981) (considering plenary power delegated to agency as indication that preemption warranted); *Garmon*, *supra* (same).

see also 1969 House Hearings, *supra*, at 263 (Statement of former Surgeon General Terry) (charging that "the so-called warning statement is a hoax on the American people, for under the product liability laws of several States the label could be a sufficient disclaimer of manufacturers' liability"); *id.* at 267-268 (Exchange between Terry and Rep. Satterfield) (concerning whether stricter label would "be even a bigger hoax"); *id.* at 380 (Exchange between Dr. Sherman and Rep. Preyer) (concerning effect of FCLA in recent cases given assumption of risk defense); *id.* at 577-581 (Exchange between Reps. Moss, Watson, Dingell, and Joseph F. Cullman III, Chair, Exec. Comm. of The Tobacco Institute) (concerning whether industry in 1965 had supported Act in order to benefit from strengthened assumption of risk defense, or whether "one of the functions of the law" was "to strip potential litigants" of claims given that defense); *id.* at 582 (Statement of Rep. Watson) (similar); *id.* at 588-589 (Statement of Rep. Thompson) (similar); *id.* at 592 (Statement of Rep. Satterfield) (similar); *id.* at 600 (Statement of Rep. Dingell) (similar).

<sup>13</sup> For example, the statute does not address advertising expenditures or cigarette production; promotion of public education; programs of health research in government or industry; or enforcement of disclosure requirements by industry. Not until 1984 did Congress determine to set a "new strategy" by taking action in some of these areas. See Comprehensive Smoking Education Act, Pub. L. 98-474, Sec. 2, 98 Stat. 2200 (1984).

Most notably for present purposes, the Act does not regulate or provide for compensating those injured by cigarette smoking. Its remedial provisions are instead paired with the discrete fields it carves out, establishing criminal and injunctive enforcement of the Act's requirements. See 15 U.S.C. 1338-1339. It is virtually inconceivable "that Congress would, without comment, remove all means of judicial recourse" for those in need of compensation. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984). "The only reasonable inference is that Congress intended the States to continue to make these judgments" through the common law system. *Pacific Gas & Electric*, 461 U.S. at 208 (referring to economic decisions); *Silkwood*, 464 U.S. at 251.<sup>14</sup>

"Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern." *Hillsborough County*, 471 U.S. at 719. This Court has, however, consistently taken care frugally to define the fields occupied exclusively by the federal government.<sup>15</sup>

<sup>14</sup> See also *International Paper Co. v. Ouellette*, 479 U.S. 481, 497-498 (1987); *Kalo Brick*, 450 U.S. at 321-324 & n.9; *Farmer v. United Bro. of Carpenters & Joiners*, 430 U.S. 290, 298-300 (1977); compare *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 484-486 (1990).

<sup>15</sup> In *Silkwood*, for example, the Court declined to preempt a suit claiming punitive damages for personal injury, despite the fact that "the Federal Government ha[d] occupied the entire field of nuclear safety concerns" and "foreclos[ed] . . . the States from conditioning the operation of nuclear plants on compliance with state-imposed standards." 464 U.S. at 249, 251 (internal quotation omitted). See also, e.g., *Pacific Gas & Electric*, 461 U.S. at 212 (declining to preempt state restriction of construction of nuclear plants due to inadequate waste storage facilities despite federal government's exclusive control over safety aspects of waste disposal); *United Brotherhood of Carpenters*, 430 U.S. at 296 (declining to follow broad preemption rule in labor context, given state interests "so deeply rooted in local feeling and responsibility" that preemption warranted only by compelling congressional direction); *Linn v. Plant Guard Workers*, 383 U.S. 53, 61 (1966).

Given that approach, it is clear that the FCLA is not "so pervasive" a scheme of federal regulation that it preempts state common law.

The evidence demonstrates as well that Congress did not consider the federal interest in providing warning to the public while minimizing disruption to the economy to be "so dominant" as to preempt state common law. *Compare, e.g., Hines*, 312 U.S. at 73 (national interest dominant in registration of aliens); *cf. New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 336-342 (1983) (same in regulation of Indian affairs). To the contrary, Congress here premised its Act on the assumption that state tort law would continue operating to compensate those injured by the danger Congress now publicized.

#### **B. The Operation of State Tort Law Does Not Conflict With the FCLA**

The statutory scheme of the FCLA, designed on the premise that state tort law would continue to operate, is not obstructed by the operation of state tort law.

First, it is manifestly not "physically impossible" for respondents to comply with both state and federal law. *See, e.g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963); *Free v. Bland*, 369 U.S. 663 (1962) (federal law conferring right of survivorship conflicted with Texas community property law); *McDermott v. Wisconsin*, 228 U.S. 115 (1913) (compliance with federal labeling regulations caused mislabeling under state statute). The FCLA requires only that respondents label their cigarette packages properly.<sup>16</sup>

(similar); *De Canas*, 424 U.S. at 359 (declining to preempt state law regulating employment of aliens despite the "comprehensiveness of the INA scheme for regulation of immigration and naturalization").

<sup>16</sup> The requirement that a cautionary notice be added to cigarette advertising was added to the Act in 1984. *See Comprehensive Smoking Education Act*, Pub. L. 98-474, Sec. 4(a), 98 Stat. 2201 (1984); 15 U.S.C. 1333.

State tort law may (or may not) impose a more stringent duty to warn, which respondents could meet by adding an additional cautionary label to cigarette packages or adding a package insert. State law also imposes a duty on respondents to avoid misrepresentation, breach of warranty, and conspiracy to defraud; respondents can meet these duties without removing the federal label on the cigarette packages.

Nor does state tort law "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. The compatibility of the federal and state laws becomes clear when the "purposes and objectives" of the FCLA are identified and the effect of state tort law on those purposes is analyzed. *See Perez v. Campbell*, 402 U.S. 637, 649-652 (1971). An agreement of purposes between federal and state laws will not suffice if the state law obstructs the methods chosen by the federal government to reach its goals. *See Ouellette*, 479 U.S. at 494.

1. In Section 2 of the 1965 Act, Congress identified the "Policy and Purpose" of the FCLA:

It is the policy of the Congress, and the purpose of this Act, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

(2) commerce and the economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, non-uniform, and confusing cigarette labeling and ad-



vertising regulations with respect to any relationship between smoking and health.

Pub.L. No. 89-92, 79 Stat. 282 (1965); see 15 U.S.C. 1331 (1970 ed.).<sup>17</sup>

The purpose of the statute is thus two-fold. First, the FCLA aims to "adequately inform[]" the public that cigarette smoking may be hazardous. The method chosen to accomplish this objective is the requirement of a federal warning label on all packages of cigarettes (see Sec. 4). Second, the Act aims to keep commerce and the national economy "protected to the maximum extent consistent with [the Act's] declared policy" and "not impeded." The method chosen to accomplish this goal is the preclusion of "diverse, nonuniform, and confusing labelling and advertising regulations" (see Sec. 5).

2. It becomes clear by examining how state tort law would actually operate in this case that it does not "stand as an obstacle" to the achievement of either objective of the Act, nor to the methods Congress chose to implement those objectives.<sup>18</sup>

As an initial matter, certain tort claims—those based on strict liability—do not affect behavior at all because

<sup>17</sup> Section 2 was amended in the Comprehensive Smoking Education Act, Pub. L. No. 98-474, Sec. 6(a), 98 Stat. 2204 (1984).

<sup>18</sup> It is not enough to conclude, as the court of appeals did in this case, that tort law may have "regulatory effect" as if that phrase (generally paired with a citation to the *Garmon* case) has talismanic significance. See Pet. App. 106a. Rather, it is necessary to identify how tort law—which is distinctive in the way it "regulates," see *Goodyear Atomic Corp.*, 108 S.Ct. at 1712—would operate on the federal scheme at issue here.

*Garmon* is generally cited to obscure this inquiry, but the case itself does not sweep so broadly. See *English*, 110 S.Ct. at 2279 n.8. Rather, the "unifying consideration" that led the Court's inquiry in *Garmon*, as in other NLRA cases, was that Congress had entrusted administration of labor policy to a "centralized administrative agency"—whose "administration" therefore was itself "regulation" that could not be obstructed. See *Garmon*, 359 U.S. at 242, 243. Given the need to delimit the area free from any but national

there is nothing a manufacturer can do to avoid payment. See *Silkwood*, 464 U.S. at 276 n.3 (Powell, J., dissenting). Such "no fault" claims are purely remedial: they function to redistribute the cost of injury from victim to manufacturer. Cf. *id.* at 263-265 (Blackmun, J., dissenting).

More generally, state law damage suits influence behavior by incentive. Unlike the flat prohibitions imposed by fines, injunctions, or criminal prohibitions, they present a manufacturer with two broad choices: the manufacturer can pay damages without changing its business methods, or it can take actions it deems sufficient to comply with obligations imposed by the State's product liability law.

#### a. *The 1965 Act.*

Putting a manufacturer to such a choice does not jeopardize either the objectives or the methods specified by the 1965 Act. The decision by a manufacturer either to pay damages or to meet additional state standards plainly does not obstruct the first federal goal—to warn the public by provision of a federal warning label. Payment by a manufacturer to injured plaintiffs does not interfere with the federal requirement to include a warning label. Nor would the manufacturer's adoption of extra measures, whether by additional voluntary disclosures on cigarette packaging, inside packaging, or in advertising, inhibit the manufacturer's ability to provide the federal warning.<sup>19</sup>

control, see *id.* at 246, the "method" by which States sought to "regulate" any subject was irrelevant. See *id.* at 243; see also *Kalo Brick*, 450 U.S. at 319-324 (focusing on plenary power of ICC).

<sup>19</sup> Section 2 makes clear that all Congress required as far as its objective to warn consumers was the assurance of a federal warning on each package. Its interest in excluding other state-required labels stemmed instead from its objective to protect commerce. See Sec. 2(2). But even if Congress felt for purposes of its warning objective that the federal label somehow needed to be alone on the package (or that the public was somehow more



Similarly, the decision by a manufacturer either to pay damages or meet additional state standards would not impede the second federal goal—to protect the economy and commerce from disruption by precluding the imposition of different labeling requirements on a national manufacturer.

The manufacturer could decide, of course, to pay damages. That strategy, assumed nationally, would add to the cost of doing business; it would not, however, disrupt business practice by requiring a manufacturer to tailor the label to many different state or local regulations.

Nor would the choice by a company to meet local products liability standards conflict with the federal purpose of protecting the national economy. Methods of meeting state liability obligations are wide-ranging while the federal prohibitions in the 1965 Act are extremely narrow. For example, a duty to warn could be met in any number of ways aside from including a "statement" on a cigarette package or in cigarette advertising. And, the method of meeting that disclosure requirement could be implemented nationally: the company could insert into all packages a notice to consumers like those found in products from aspirin to household appliances.<sup>20</sup>

In short, the essence of products liability law is to impose a duty; the manufacturer can satisfy that duty in any number of ways. Thus, state tort suits cannot realistically be said to "require" the selection of the one

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adequately warned by excluding state warning requirements in advertising), a choice by the manufacturer to comply with state law would not lead to the frustration of federal law, for the reasons explained below. See pp. 26-27, *infra*.

<sup>20</sup> The cigarette manufacturers' only complaint could be that, in order to protect themselves completely from liability, they (like other manufacturers) would have to model the warning to meet standards in the States most protective of their citizens. *Amici* do not understand this concern to be the foundation of respondents' arguments. In any case, while such a warning may decrease sales because more information is made available to the public, the Act does not identify that type of economic disruption as its concern.

method—the addition of a "statement" to either a package (Sec. 5(a)) or advertising (Sec. 5(b))—that would disrupt the economy and impede commerce in a manner arguably inconsistent with the FCLA. See *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) (existence of "potential conflict" not sufficient to warrant preemption).<sup>21</sup>

There is, however, yet another choice available in this case: the very existence of the federal scheme provides manufacturers with the option of petitioning Congress to obtain a stronger federal warning, thereby safeguarding themselves against failure to warn claims. In fact, respondents were offered precisely this choice. In a lengthy exchange with Joseph F. Cullman III, who represented the cigarette manufacturers before Congress during the 1969 hearings, a number of congressmen emphasized the fact that Congress "would be aiding the tobacco companies" by amending the Act to require a stronger warning since "in effect from a legal standpoint it would give [tobacco companies] a better chance against anyone charging that they had contracted a disease of some sort because of the use of cigarettes." See *1969 House Hearings, supra*, at 589 (Statement of Rep. Thompson); *id.* at 577-600 (Exchange with Reps. Moss, Broyhill, Watson, Dingell, Satterfield). Cullman was then asked to "state his preferences" regarding a number of proposed warning labels. See *id.* at 589 (Statement of Rep. Pickle). The industry thus faced explicitly and in a federal forum the decision incumbent on all manufacturers to balance concerns about liability against the possibility of diminished profits. In light of this additional channel for making the disclosure decision, a channel that would (and still may) ease litigation burdens by standardizing the liability issue, it is incongruous for respondents to argue

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<sup>21</sup> Likewise, common law obligations not to breach express warranties, not to make affirmative misrepresentations, and not to engage in fraudulent activity need not be carried out by way of making a "statement" either on packaging or in advertising.

that they are immunized from compliance with state tort law by the existence of the federal statute.<sup>22</sup>

b. *The 1969 Act.*

Congress did not bring the Act into conflict with state law when it amended the statute in 1969. The narrow language of Section 5(a), of course, remained unchanged. Thus manufacturers seeking to meet state law duties to warn, which are generally based on duties to notify purchasers by placing notices in or on packaging, *see* note 3, *supra*, faced the same set of choices they had in 1965.

As reviewed above, Congress broadened the language of Section 5(b) in order to clarify that just as States could not require cautionary content in advertising, neither could they "prohibit" advertising or promotion altogether or in part for reasons "based on smoking and health." The amendment creates no conflict, because claims "based on" common law duties (such as the obligation to be truthful) function independently of requirements or prohibitions "based on smoking and health." *See* page 19, *supra*. The terminology accurately reflects the fact that Congress was writing with state legislatures and agencies in mind; it thus preserves the statute from conflicting with state tort law.<sup>23</sup>

<sup>22</sup> Instead of operating on the assumption that state tort law would continue in effect, respondents could, of course, have petitioned Congress to preempt state tort law expressly. They did not make that request, apparently because of their disagreement with the conclusion that smoking caused injury. *See 1969 House Hearings, supra*, at 600 (Testimony of Joseph F. Cullman III, Chair, Exec. Comm. of The Tobacco Institute) (noting that liability suits had not been problem for industry because plaintiffs were not prevailing). Because respondents did not bring to Congress the preemption request they now make to the Court, the chances that preemption of state tort law was part of the congressional compromise on the bill are small.

<sup>23</sup> The importance of the term "based on" is a point well made by comparing the language of the court of appeals, the respondents, and the petitioner in this case. The court of appeals held pre-

3. Ultimately, the existence of a conflict that warrants preemption remains a question of congressional intent. Even if it perceives tension between the operation of state law and a federal statute, this Court cannot conclude that preemption is required if the statute, its structure and history indicate that Congress is willing to live with that tension. *Silkwood*, 464 U.S. at 256.

Section 2 of the Act establishes that Congress was willing to tolerate whatever tension may exist between the FCLA and state tort law. According to that section, the "policy of Congress" and "purpose of this Act" is to establish a comprehensive federal program through which (1) "the public may be adequately informed" and (2) "commerce and the national economy may be [] protected to the maximum extent consistent with this declared policy." Emphasis added. This last proviso is grammatically circular: the national economy is to be protected only to the extent consistent with a policy "whereby the public may be adequately informed . . . and the economy may be [] protected to the maximum extent consistent with" the policy. However, it seems most likely that Congress meant in the second clause to refer to the "policy" as given substance in the first clause. That is, the primary policy or purpose of the Act is adequately to warn the public by requiring a federal label on cigarettes.<sup>24</sup>

empted all state tort claims "relating to smoking and health." *See* Pet. App. 106a (emphasis added). The respondents similarly rephrase the scope of Section 5(b) in their Question Presented as including "health-related 'requirement[s] or prohibition[s].'" *See* Resp. Mem. i (emphasis added). That is, the conclusion that Section 5(b) has a broad preemptive sweep necessitates a departure from the clear language of the statute. *Compare FMC Corp.*, 111 S.Ct. at 407-408 (discussing breadth of phrase "relates to" for preemption purposes). Petitioner, by contrast, accurately refers in his Question Presented to claims "premised on" the adequacy of warnings, the propriety of advertising, or deceptive behavior. *See* Pet. i.

<sup>24</sup> *See, e.g., H.R. Rep. No. 449, supra*, at 1 ("The principal purpose of the bill is to provide adequate warning to the public"); 111 Cong. Rec. 14,409 (1965) (Statement of Rep. Harris) (simi-

There may be circumstances in which Congress's primary purpose adequately to warn the public is not accomplished by the federal label. In these circumstances, incentives to add additional warnings would reinforce, not undermine, the primary warning purpose of the Act and the federal label. And in that situation, the Act's secondary goal—to protect commerce and the economy by precluding diverse labeling requirements—must give way. That goal, to be achieved only “to the maximum extent consistent” with Congress's primary purpose that the public receive adequate warning, is subordinate to the accomplishment of that primary purpose.<sup>25</sup>

### CONCLUSION

The judgment of the court of appeals should be reversed.

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lar); *id.* at 14,418 (Statements of Reps. Broyhill, Cooley) (similar); *id.* at 16,541 (1965) (Statement of Rep. Harris) (similar).

<sup>25</sup> The court of appeals, by conflating Section 5 (15 U.S.C. 1334) and Section 2 (15 U.S.C. 1331), effectively reads Section 2 as a definitional section. *See* Pet. App. 105a-106a. Under that interpretation, Congress in Section 2 identified a comprehensive federal program under which, *by definition*, the public is adequately warned by the federal label alone because any additional warning would upset the balance struck by the Act.

The problem is that Congress did not identify Section 2(1) as a definition. Rather, that section is part of the “purpose,” not the “effect,” of the federal program. Moreover, Congress's determination to preclude diverse warning labels does not, according to the statute, have to do with the *warning* objective of the Act. *See* Sec. 2(1). Rather, it is the method chosen to reach the *protection of the economy* objective. *See* Sec. 2(2). Thus, the method (precluding diverse labels) does not function as part of the definition that the public be adequately warned. It should not, therefore, be incorporated into that “definition.”

Respectfully submitted,

RICHARD RUDA \*  
Chief Counsel

CHRISTINE DESAN HUSSON  
STATE AND LOCAL LEGAL CENTER  
444 North Capitol Street, N.W.  
Suite 349  
Washington, D.C. 20001  
(202) 638-1445

\* *Counsel of Record for the*  
*Amici Curiae*

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NO. 90-1038

Supreme Court, U.S.

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IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1990

THOMAS CIPOLLONE, individually and as Executor  
of the Estate of Rose D. Cipollone, Petitioner  
v.

LIGGETT GROUP, INC., a Delaware Corporation;  
PHILIP MORRIS INCORPORATED, a Virginia  
Corporation; and LOEW'S THEATRES, INC.,  
a New York Corporation, Respondents

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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BRIEF AMICUS CURIAE OF THE  
SIX FORMER SURGEONS GENERAL OF THE  
UNITED STATES, THE AMERICAN COUNCIL FOR  
SCIENCE AND HEALTH, AND THE  
TOBACCO PRODUCTS LIABILITY PROJECT

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Richard A. Daynard  
Northeastern University  
School of Law  
400 Huntington Avenue  
Boston, MA 02115  
(617) 437-2026  
Counsel of Record

Counsel for Amici

S. Stephen Rosenfeld  
Stern, Shapiro, Rosenfeld  
& Weissberg  
80 Boylston Street  
Suite 910  
Boston, MA 02116  
(617) 542-0663

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IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1990

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NO. 90-1038

THOMAS CIPOLLONE, individually and as  
Executor of the Estate of Rose D.  
Cipollone, Petitioner

v.

LIGGETT GROUP, INC., a Delaware  
Corporation; PHILIP MORRIS  
INCORPORATED, a Virginia  
Corporation; and LOEW'S THEATRES,  
INC., a New York Corporation,  
Respondents

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BRIEF AMICUS CURIAE OF THE  
SIX FORMER SURGEONS GENERAL OF  
THE UNITED STATES,  
THE AMERICAN COUNCIL FOR SCIENCE  
AND HEALTH, AND THE TOBACCO PRODUCTS  
LIABILITY PROJECT

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### INTEREST OF THE AMICI

Letters from the parties granting consent for this brief have been filed with the Clerk of this Court.

All six living former Surgeons General of the United States join as amici in this brief. Leonard A. Scheele, M.D., served from 1948 to 1956. Leroy E. Burney, M.D., served from 1956 to 1961, and in 1957 became the first Surgeon General to call public attention to the likelihood that cigarette smoking caused lung cancer. William H. Stewart, M.D., served as Surgeon General from 1965-1969. Jesse L. Steinfeld, M.D., served as Surgeon General from 1969 to 1973 and participated in the amendment process in 1969 and 1970 that strengthened the Federal Cigarette Labeling and Advertising Act (the Labeling Act). Julius B. Richmond, M.D., served as Surgeon General and Assistant Secretary of Health from 1977 to 1981, and led executive branch efforts to inform the public of the dangers of smoking, including the publication of the comprehensive Fifteenth Anniversary Surgeon General's Report in 1969. C. Everett Koop, M.D., served as Surgeon General from 1981 to 1989, and was responsible for the Surgeon General's Reports on the relationships between smoking and various cancers, cardiovascular disease, chronic obstructive lung disease, workplace illnesses, and nicotine addiction, as well as the comprehensive 1989 report, titled Reducing the Health Consequences of Smoking: 25 Years of Progress.

Each of these former Surgeons General has dedicated his professional life to improving the public health in the United States. Each has recognized the

enormous damage that cigarette smoking has done to the health of millions of citizens, as the leading preventable cause of death and disease in the United States. In the opinion of the amici, reversal of the Court of Appeals decision preempting the cigarette manufacturers' common law obligations to tell the truth about their products will make a significant contribution to the public health.

The amicus American Council on Science and Health (ACSH) is a public health education advocacy group dedicated to providing Americans with sound, scientific data to enable them to separate real from hypothetical risks. ACSH is directed and advised by 200 American and Canadian scientists and physicians. ACSH has, since its founding in 1978, given first priority to clarifying the role of cigarette smoking as the leading preventable cause of death and disease in the United States. ACSH joins this brief because it believes that the legal immunity conferred by the lower court has permitted cigarette manufacturers to continue to confuse the American public about the risks of cigarette smoking, undermining informed choice.

The amicus Tobacco Products Liability Project was established in 1984 by a group of doctors, attorneys, and academics, to engage in advocacy seeking to subject the tobacco industry to the same obligations to consumers and the public as other American industries. The Project, which is part of the nonprofit organization Clean Indoor Air Educational Foundation, has submitted amicus briefs in the First, Third, Sixth and Eleventh Circuit Courts of Appeal on the preemption question presented here.

## STATEMENT OF THE CASE

This is a state common law tort action brought in federal district court pursuant to its diversity jurisdiction. The plaintiff's claims are for personal injury and wrongful death caused by decades of smoking cigarette products manufactured by the respondents. Early in the litigation the respondents raised as a defense the argument that the plaintiff's claims were preempted by the Labeling Act, 15 U.S.C. sec. 1331 *et seq.* Essentially, the cigarette manufacturers argued that claims based on their failure to warn smokers and the public of the serious dangers of smoking, and claims that they engaged in false and misleading practices, could not be heard on the merits because Congress, in passing an act to mandate warning labels on cigarette packages, had precluded such claims. The district court ruled against the respondents but was reversed after the issue was certified for interlocutory appeal to the Third Circuit Court of Appeals. A petition for certiorari from that interlocutory decision was denied, and the case proceeded through discovery and trial on claims arising prior to passage of the Labeling Act.

The jury reached a verdict granting recovery on certain claims, denying recovery on others. On appeal the Third Circuit affirmed the sweeping reading of its preemption decision by the district court, which had held that it covered intentional tort claims as well as claims of negligence.

## SUMMARY OF ARGUMENT

This brief will not repeat the arguments presented by the petitioners and the other amici regarding the doctrine of preemption as expounded by the Supreme Court, or the meaning of the Labeling Act as revealed by its language, structure, and legislative history. Rather, since it is the state common law of products liability that will either survive or fall under the disposition of this case, the amici believe it is essential for the Court to fix its attention on the nature of that state law, to determine whether in practical fact it poses a threat to either the purpose or the operation of federal law. The respondents have attacked the common law duty to warn, but they have not taken care to explain it. Since the overriding goal of the amici, as stated in the Interests section, supra, has been to open up the channels of communication so that consumers and would-be consumers across this country can come to understand fully the serious dangers associated with cigarette smoking, the amici believe it is vital that the duty to warn be preserved in the area of cigarette products. In the view of the amici, the cigarette manufacturers' acceptance of their responsibility under the common law is our best hope for ensuring that the dangers of cigarette use are finally brought home to the American public.

The duty to warn is neither in actual conflict with the Labeling Act, nor does it threaten to undermine its regulatory design. The decisions of state courts make clear that cigarette manufacturers have means available to provide an adequate warning about the serious and often life-threatening risks of smoking that are not in conflict

with the Labeling Act. In fact, the respondents and other cigarette manufacturers have over the years utilized all the methods recognized by the common law for communicating information about products, but rather than deliver warnings, they have used these methods to challenge the significance of scientific data documenting the risks of smoking. The same techniques would also be available for satisfying the cigarette manufacturers' duty to warn.

In truth, the respondents have been counting on preemption to shield them from the continuing and dynamic obligation borne by every other manufacturer in America in products liability cases, to keep abreast of evolving knowledge about their products and share new knowledge about risks with consumers. That shield does not serve the goals of the Labeling Act, it mocks them.

In like manner the respondents seek to turn the Labeling Act on its head, arguing that its reference to cigarette "advertising or promotion" goes so far as to protect them from accountability under the common law duty to warn even when they use advertising and promotion to undermine the impact of the cigarette warning label. They argue, in essence, that the Congress engaged in sabotage of its own legislative goal of advancing public health by immunizing even their intentional efforts to mislead the public about the risks of cigarette smoking from state suits for compensation. This Court has given such arguments short shrift in the past; it should do so here.

## ARGUMENT

THE COMMON LAW DUTY TO PROVIDE AN ADEQUATE WARNING REQUIRES ONLY THAT CIGARETTE MANUFACTURERS FIND WAYS TO COMMUNICATE THE TRUTH ABOUT THEIR PRODUCT, AND WAYS ARE AVAILABLE FOR COMMUNICATING THE TRUTH THAT DO NOT CONFLICT WITH FEDERAL LAW.

A. This Is Not A Case About Conflicting Label Requirements, Because The Common Law Of Products Liability Imposes On Manufacturers A Duty To Warn, Not A Duty To Label, And That Duty To Warn Can Be Met In Various Ways Without Undermining The Federal Labeling Requirements.

A fundamental principle of preemption holds that state law which does not conflict directly and irreconcilably with federal law should be permitted to stand. Accordingly, preemption analysis demands that the Court scrutinize not only the Act of Congress for which supremacy is claimed, but the state law that is targeted for execution.<sup>1/</sup>

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<sup>1/</sup>The purpose of dual interpretation of state and federal law is to find a way, if one is legitimately available, to avoid unnecessary state-federal friction, by permitting a local law which does not conflict directly and



Moreover, the respect that our system of federalism pays to state and local law counsels that the Court demand more than the Third Circuit's superficial portrayal.<sup>2/</sup>

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irreconcilably with federal law to stand. See, e.g., Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963) (in determining whether federal securities regulation preempts local regulation, "the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted").

<sup>2/</sup>It should not escape the Court's notice that the Third Circuit's holding on preemption contained no analysis of the operation of state law whatsoever. Its entire examination of the issue was as follows:

Having identified the purposes of the [Labeling and Advertising] Act, we now must evaluate the effect of the operation of state common law claims on these purposes. In so doing, we accept the appellants' assertion that the duties imposed through state common law damage actions have the effect of requirements that are capable of creating "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." As the appellants point out, several Supreme Court opinions reflect recognition of the regulatory effect of state law damage claims and their potential for frustrating congressional objectives.

Common law, in particular, is the bedrock of local law, and although it is subject to preemption, the respondents must shoulder the heavy burden of showing that the nature and operation of the common law of products liability is such that a head-on collision between the Labeling Act and the common law will inevitably occur if the two systems are permitted to coexist. The respondents have made no such showing, nor can they, because the law of New Jersey -- in harmony with the common law of products liability generally -- is sufficiently broad-gauged and flexible to permit it to fulfill its role without interfering with the purpose or operation of the federal law in any way.

The role of products liability law at one level is to

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Applying this principle, we conclude that claims relating to smoking and health that result in liability for noncompliance with warning, advertising, and promotion obligations other than those prescribed in the Act have the effect of tipping the Act's balance of purposes and therefore actually conflict with the Act. Cipollone v. Liggett Group, Inc., 789 F.2d 181, 187 (1986) cert. denied 479 U.S. 1043 (1987) (citations and footnote omitted).

The bold act of displacing the state's common law deserved far more by way of analysis than this ipse dixit approach.

compensate. When the salutary, interdependent relation between manufacturer and consumer has broken down, and injury that was avoidable has occurred because the manufacturer has failed in its responsibility for communicating about the dangers of its product and how to avoid them, the common law requires compensation. At a more fundamental level, however, it is clear that the root of the duty to warn is not the compensation itself, but the manufacturer's unfairness in not sharing information, and thereby imposing risks on the consumer of which the consumer is unaware. The premise of this branch of the common law is that, in the case of a prudent consumer, adequate warnings prevent injuries, and in the case of consumers who do not take adequate warnings to heart, their own lack of prudence precludes a right to recover.<sup>3/</sup>

Because the principle of effective information-sharing behind the duty to warn is result-oriented, the common law relies not on rigid formulae or abstract doctrines; there is no preordained type of communication that automatically passes or fails the liability test. It is not

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<sup>3/</sup>See, e.g., Wooderson v. Ortho Pharmaceutical Corp., 235 Kan. 387, 681 P.2d 1038 (1984) ("There is a presumption that an adequate warning would be heeded. This operates to the benefit of the drug manufacturer [of oral contraceptives] where adequate warnings are in fact given, but where warnings are inadequate, the presumption is in essence a presumption of causation"). See also Keeton, "Products Liability--Problems Pertaining to Proof of Negligence," 19 Sw. L.J. 26, 34 (1965).

a common law of labels, or of public service announcements, or of warning brochures, or package inserts, or instruction manuals. All these methodologies have a potential role, and the manufacturer has wide latitude in determining how to warn and thereby to avoid liability. If the warning is accurate, clear and unambiguous,<sup>4/</sup> if it is sufficiently intense in language to communicate the gravity of the risks involved in the use of the product,<sup>5/</sup> if it is complete and unclouded by

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<sup>4/</sup>"[W]e recognize that the function of language is not only to express ideas accurately, but to communicate them effectively. The touchstone must be the impression created by the directions or warnings on the average reasonable consumer." D'Arienzo v. Clairol, Inc., 125 N.J. Super. 224, 310 A.2d 106 (1973); Felix v. Hoffman-LaRoche, Inc., 540 So.2d 102 (Fla. 1989) (adequacy of warnings regarding side effects of prescription drugs can become a question of law and taken from the jury if the warning is "accurate, clear, and unambiguous"). For a thorough and up to date treatment of the duty to warn and its ramifications, see Wrubel, "Liability for Failure to Warn or Instruct," Pract. Law Inst. Litigation and Administrative Practice Course Handbook Series: Litigation (1989).

<sup>5/</sup>See, e.g., Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076, 1104 (5th Cir. 1973) (Texas law) (warnings failed to intimate the dangers of fatal illness caused by asbestosis and mesothelioma. The words "may be harmful" held to convey "no idea of the extent of the danger").

contradictory messages,<sup>6/</sup> and as long as the methods chosen are likely to find their way to those who need the warning,<sup>7/</sup> the duty to warn is satisfied.<sup>8/</sup>

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<sup>6/</sup>See part C, *infra*.

<sup>7/</sup>See, e.g., Broussard v. Continental Oil Co., 433 So. 2d 354 (La. Ct. App. 1983) (single warning label referring consumer to owner's manual was adequate given the number and complexities of specific warnings); Wrubel, *op. cit.* n. 4, at 27.

<sup>8/</sup>See, e.g., Wyeth Laboratories, Inc. v. Fortenberry, 530 So.2d 688 (Miss. 1988) (en banc) (package insert warning physicians of possible adverse reactions to non-swine flu vaccine found adequate as matter of law); Humes v. Clinton, 286 Kan. 590, 792 P.2d 1032 (1990) (warning brochure satisfies manufacturer's warning obligation in case of injury caused by IUD); Erickson v. American Honda Motor Co., 455 N.W.2d 74 (Minn. Ct. App. 1990) (*rev. den* 1990) (video and brochure to warn prospective buyers of all terrain vehicles of the dangers; verdict for plaintiff on other grounds); East Penn Mfg. Co. v. Pineda, 578 A.2d 1113 (D.C. Ct. App. 1990) (pamphlet and manual provide adequate warning of risks in recharging battery); Firestone Tire & Rubber Co. v. Battle, 745 S.W.2d 909 (Tex. Ct. App. 1988) (In upholding verdict for plaintiff, court cites manufacturer's failure to warn in the face of recommendation from safety expert that pamphlet be widely disseminated in order to reduce or eliminate "spin-break" accidents from hidden defect in

The cigarette manufacturers are, in fact, well-versed in finding diverse ways to deliver their own peculiar health message to consumers. For example, they provide a toll-free telephone number for journalists to call to obtain comments from "the other side" when news stories break about the hazards of smoking.<sup>9/</sup> They offer trained spokespersons to appear on national and local radio and television programs to defend against reports on smoking risks.<sup>10/</sup> They give press conferences to coincide with the release of the Surgeon General's Reports, in order to rebut the health assertions contained in these

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tires); Cobb v. Syntex Laboratories, 444 So.2d 203, 205 (La. Ct. App. 1983) (manufacturer not liable because patient received manufacturer's pamphlet from physician specifically warning of risk of stroke from birth control pills).

The use of more than one method for warning consumers of the risks associated with the product can provide strong evidence of an adequate effort to warn. See, e.g., Rivers v. Am. Tel. & Tel. Technologies, et al, 147 Misc.2d 366, 554 N.Y.S. 2d 401 (Sup. Ct. 1990) (manufacturer's effort to warn every link in the chain of distribution of chemical, with label on barrels, package inserts for physicians, and instruction manuals preclude liability on a failure to warn theory).

<sup>9/</sup>See, e.g., Broadcasting, April 18, 1983, at 9.

<sup>10/</sup>*Id.*



reports.<sup>11/</sup> They have even run full-page newspaper and magazine advertisements dedicated entirely to disputing public health findings.<sup>12/</sup> Significantly, they apparently have not considered these advertisements to come within the ambit of the Labeling Act, since they have not put the Surgeon General's warnings on them. These same methods would be as effective in warning about the dangers of smoking as they have been in disputing them.<sup>13/</sup>

Thus, under these prevailing principles of the common law, the federally mandated label may be left completely intact. If to avoid liability the respondents have a responsibility to communicate the knowledge they possess of the dangers of smoking, they also have a variety of means available to them, and the operation of tort law in trials in state court will not interfere with the purpose or

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<sup>11/</sup>See, e.g., New York Times, January 12, 1979, at 1, 11.

<sup>12/</sup>These advertisements appear as exhibits in the Federal Trade Commission opinion in In the Matter of R.J. Reynolds Tobacco Co., Dkt. 9206, 5 CCH Trade Regulation Reporter para. 22,522 at 22,197-22,215 (1988).

<sup>13/</sup>Another common method for warning of health risks, package inserts, has been employed by one cigarette manufacturer. See package insert, appended to this brief, which R.J. Reynolds Tobacco Co. included inside every pack of Premier cigarettes.

operation of the federal act.<sup>14/</sup> The federal labeling requirements will not be tampered with; rather, an examination will be made whether the state of knowledge about smoking risks obligated the respondents and other cigarette manufacturers to use one or more of the other available means of communication to warn the plaintiff of dangers not covered by the label. Far from undermining the purpose of the federal law, Congress' primary goal of "adequately inform[ing the public] about any adverse health effects of cigarette smoking"<sup>15/</sup> is best served by permitting the state law to function in precisely the fashion that it has evolved in the products liability area, making information-sharing between manufacturer and consumer the essential price by which freedom from this type of tort liability is purchased.

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<sup>14/</sup>Even if a direct conflict between state and federal law were somehow to arise in the course of a trial, then "preemption...is limited to a holding that the specific issue decided by the jury imposing liability on [the manufacturer] was preempted as a result of direct conflict between our state's decisional law and the [federal law]." Feldman v. Lederle Laboratories, 234 N.J. Super. 559, 561 A.2d 288, 296 (1989) (in case where duty to warn imposed obligation in conflict with explicit FDA regulations, the duty to warn remains operative, but the particular claim is precluded by the Supremacy Clause).

<sup>15/</sup> 15 U.S.C. sec. 1331.

B. By Mischaracterizing Their Duty Under The Common Law, The Cigarette Manufacturers Seek To Shield Themselves From The Dynamic And Continuing Obligation Borne By Every Other Manufacturer In America In Products Liability Cases, To Keep Abreast Of Evolving Knowledge About Their Products And Share New Knowledge About Risks With Consumers.

The manufacturer's duty to warn consumers under state law contains a corollary, continuing duty to search for knowledge about its products that would tend to reveal hidden risks. In contrast, the duty to warn as the respondents would frame it, limited to the four corners of the federal act and its narrow labeling requirement, is frozen in time. Regardless of how significantly knowledge about the dangers of cigarette smoking has advanced, the respondents may turn a blind eye, at least until the periodic Congressional tug of war produces a different requirement, at which point a new frozen-in-time warning requirement replaces the old.

If the respondents' version of preemption succeeds, the important incentive for manufacturer vigilance fostered by the duty to warn will not apply. If, however, the shield of preemption is unavailable to them, the cigarette manufacturers will for the first time be encouraged to recognize that they bear the same continuing responsibility to inform the public fully about the risks of their products as is borne by every other manufacturer in America. See, e.g., Gingold v. AUDI-NSU Auto Union, 389 Pa. Super. 328, 567 A.2d 312, 329 (1989) (child auto restraints: "The specter of damage actions may provide manufacturers with

added dynamic incentives to continue to keep abreast of all possible injuries stemming from the use of their product so as to forestall such actions through product improvement," quoting from Ferebee v. Chevron Chemical Co., 736 F.2d 1529, 1541-42 (D.C. Cir. 1984)); Barry v. Don Hall Laboratories, 56 Or. App. 518, 642 P.2d 685, 689 (1982) (vitamins: "The duty is to keep abreast of research and knowledge...in its field and to warn of 'all reasonable dangers which the manufacturer knows or should know concerning the product in its use by the purchaser'").<sup>16/</sup>

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<sup>16/</sup>The products that have undergone scrutiny under the continuing duty to "keep abreast" of research and knowledge are amazingly diverse. See, e.g., Carolina Home Builders, Inc. v. Armstrong Furnace Co., 259 S.C. 346, 191 S.E.2d 774 (1972) (air conditioners); LaPlant v. E.I. DuPont De Newours and Co., 346 S.W.2d 231 (Mo. Ct. App. 1961) (chemical weed-killer); Westinghouse Elec. Corp. v. Nutt, 407 A.2d 606 (D.C. 1979) (elevators); Whitacre v. Halo Optical Products, Inc., 501 So.2d 994 (La. Ct. App. 1987) (safety goggles); Monsanto Co. v. Miller, 455 N.E.2d 392 (Ind. Ct. App. 1983) (silo coating material); Manietta v. International Harvester Co., 496 A.2d 286 (Me. 1985) (dump trucks); Feldman v. Lederle Laboratories, 97 N.J. 429, 479 A.2d 374 (1984) (tetracycline); Wooderson v. Ortho Pharmaceutical Corp., 235 Kan. 387, 681 P.2d 1038 (1984) (oral contraceptive); Antley v. Yamaha Motor Corp., 539 So.2d 696 (La. Ct. App. 1989) (all-terrain vehicles); Barson v. E.R. Squibb & Sons, Inc., 682 P.2d 832 (Utah 1984) (hormone drug); Strain v. Mitchell Manufacturing Co., 534 So.2d 1385

C. It Is True That The Duty Under State Law To Provide Accurate Information To Consumers Would Jeopardize The Efforts Of Cigarette Manufacturers To Negate The Message Of The Mandated Warning Labels, But Nothing In The Federal Act Or The Doctrine Of Preemption Supports The Attempts Of The Cigarette Manufacturers To Escape Accountability For Such Conduct In Product Liability Cases.

The common law obligation of the manufacturer of a dangerous product is not limited to telling its customers and potential customers the truth about the nature and extent of the hazards of its product: it must also tell the whole truth and nothing but the truth. RESTATEMENT 2D TORTS, §527 and §529 (the whole truth), §402B and §557A (nothing but the truth). The obligation is violated where the manufacturer uses studied ambiguities, half-truths, and false impressions in an effort to maintain sales while pretending to tell the truth. Thus, "overpromotion" of a product may vitiate an otherwise valid warning.<sup>17/</sup>

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(La. Ct. App. 1988, writ den. 1989) (collapsible school lunch tables); and George v. Celotex, 914 F.2d 26 (2d Cir. 1990) (asbestos).

<sup>17/</sup>"Action designed to stimulate the use of a potentially dangerous product must be considered in testing the adequacy of a warning as to when and how the product should not be used." Incollingo v. Ewing, 444 Pa. 263, 282 A.2d 206, 220 (1971).

Cigarette manufacturers have used misleading words and visual imagery in a frequently successful effort to confuse children and teenagers who are contemplating smoking about the reality, nature, and extent of the dangers, as well as to provide addicted smokers with rationalizations for not quitting. In this way the manufacturers negate the warning label and other information about the risks of smoking. The evidence presented by the plaintiff on this subject was summarized by the trial court below as follows:

Evidence presented by the plaintiff, particularly that contained in documents of the defendants themselves, indicates the development of a public relations strategy aimed at combating the mounting adverse scientific reports regarding the dangers of smoking. The evidence indicates further that the industry of which these defendants were and are a part entered into a sophisticated conspiracy. The conspiracy was organized to refute, undermine, and neutralize information coming from the scientific and medical community and, at the same time, to confuse and mislead the consuming public in an effort to encourage existing smokers to continue and new persons to commence smoking. Cipollone v. Liggett Group, Inc., 683 F. Supp. 1487,



1490 (D.N.J. 1988); see generally *id.* at 1490 - 1493.

Although most of the evidence at trial perforce concerned the respondents' pre-1966 conduct, there is ample evidence, both in the trial record below and in the public record, that their efforts to undermine the government's public health education campaign have continued unabated. Thus, the Tobacco Institute, the industry's designated public relations and lobbying representative, continued to run advertisements such as the one, which ran in newspapers on December 1, 1970, headlined "After millions of dollars and over 20 years of research: The question about smoking and health is still a question." (P-2920, J.A. 42). The pretextual nature of this continuing "research" is documented in a 1974 Lorillard memorandum: "Historically, the joint industry funded smoking and health research programs have not been selected against specific scientific goals, but rather for various purposes such as public relations, political relations, position for litigation, etc." (P-939, J.A. 60). The techniques used by the industry to undermine public understanding of the dangers of their products included "creating doubt about the health charge without actually denying it" (P-1105, J.A. 51), and "attacking researchers themselves, where vulnerable" (P-2745, J.A. 70).

A dramatic application of the industry's strategy is the series of full-page advertisements which the R.J. Reynolds Tobacco Company ran in newspapers and

magazines in 1984 and 1985.<sup>18/</sup> The first of the series asked for "an open debate about smoking," asserting that "[s]tudies which conclude that smoking causes disease have regularly ignored significant evidence to the contrary." (P-2935; J.A. 72).<sup>19/</sup> Another one, entitled "Of cigarettes and science," asserted that the belief that smoking causes heart disease "is an opinion. A judgment. But not scientific fact".<sup>20/</sup> Several other advertisements contain the assertion that "there is little evidence -- and certainly nothing which proves scientifically -- that cigarette smoke causes disease in non-smokers."<sup>21/</sup>

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<sup>18/</sup>See n. 12, *supra*.

<sup>19/</sup>*Id.*

<sup>20/</sup> This advertisement was the subject of a 1986 FTC complaint, which resulted in a May 22, 1989 consent judgment in which the respondent agreed, inter alia, to refrain from "[m]isrepresenting in any manner, directly or by implication, in any discussion of cigarette smoking and chronic or acute health effects, the results, design, purpose or content of any scientific test or study explicitly referred to concerning any claimed association between cigarette smoking and chronic or acute health..." In the Matter of R.J. Reynolds Tobacco Co., Dkt. 9206.

<sup>21/</sup>Exhibits 2-D, 2-F, and 2-G, 5 CCH Trade Regulation Reporter para. 22,522, at 22,201, 22,203, and 22,204. The Federal Court of Australia found, in an exhaustive 210-page opinion issued on February 7, 1991,

The Federal Trade Commission concluded in its 1967 report to Congress pursuant to sec. 1337 of the Labeling Act that "[t]here is virtually no evidence that the warning statement on cigarette packages has had any effect," and that part of the reason may be that "[c]igarette advertising continues to promote the idea that cigarette smoking is both pleasurable and harmless." The FTC's 1969 report concluded that "current cigarette advertising leaves the impression that cigarette smoking is a healthy activity and one whose risk, to the extent that it exists, can be reduced through the presence of a filter." See Senate Report (Commerce Committee) No. 91-566, Dec. 5, 1969 [To accompany H.R. 6543], 1970 U.S. Code Cong. & Adm. News 2655 - 2657 (quoting both FTC reports).

Twenty years later, nothing fundamental had changed:

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in Australian Federation of Consumer Organizations Inc. v. Tobacco Institute of Australia (New South Wales, No. G 253 of 1987) that the identical statement made in Australian newspaper advertisements in 1986 was incorrect, and that if the industry was permitted to repeat this assertion, "Active smokers are likely to be misled or deceived by the statement into believing that their smoking does not prejudice the health of non-smokers. Non-smokers are likely to be deceived or misled by the statement that cigarette smoke does not affect their own health or the health of their children. These are serious matters." Id. at 209.

Despite the fact that cigarette warning labels have been required since 1966, there are few data about their effectiveness in meeting any objective... [T]here is empirical evidence that the public did not pay much attention to the pre-1985 labels in advertisements...

These findings are consistent with analyses of the visual imagery of tobacco advertising, which note that the structures of the ads draw consumers' attention away from the warnings contained in the ads. It has also been argued that the sheer volume of cigarette advertising, all applying the basic themes of product satisfaction, positive image associations, and risk minimization, overwhelm the in-advertisement warnings.

U.S. Dep't of Health and Human Serv., Reducing the Health Consequences of Smoking: 25 Years of Progress. A Report of the Surgeon General, at 478 - 477 (1989)(references omitted).

Such conduct, if proved, violates the respondents' duty to warn. It is not, as the respondents' have argued, protected by the Labeling Act. The principal purpose of the Federal Cigarette Labeling and Advertising Act is to increase the information available to consumers about the true relationship between smoking and health. Banzhaf v. Federal v. Communications Comm'n, 405 F.2d 1082 (D.C. Cir. 1968). The use by cigarette companies of studied ambiguities, half-truths, or false impressions to describe this relationship subverts this purpose. Even if it

were possible to read the words of 15 U.S.C. §1334(b) so expansively as to protect the manufacturers against common law claims for misrepresentation, fraud, and conspiracy based on deceptive health claims, such an extreme reading would serve only to undermine Congress' principal purpose of advancing public health. This Court has rejected much more solidly based statutory readings, where the effect would be to provide "a ready means by which...the wrongs which the statute was intended to remedy could be successfully inflicted." Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907); see Johnson v. Southern Pacific Co., 196 U.S. 1, 14, 18 (1904).

It is hard to see how the methods of communication that have been employed to undermine the impact of the warning label mandated by the Labeling Act should be protected, while the state's common law that contemplates the use of these methods to reinforce the warning label and ensure that Congress' message gets through should be preempted. This is the essence of the respondents' perverse argument, and it deserves rejection.

D. If The Cigarette Manufacturers Are Held To The Same Legal Standards As The Manufacturers Of Other Dangerous Products, Potentially Life-saving Information Will Flow To Addicted Adults, As Well As To Teenagers And Children Who Are Contemplating Smoking, About The Specific Illnesses Associated With Cigarettes And The Probability Of Illness And Death.

If cigarette manufacturers are not held to enjoy a

special federal immunity from state law torts standards, they will have to find means to communicate, effectively and unambiguously, to their customers and potential customers, the nature and extent of the hazards of using their products. Although there may be limits to the potential effectiveness of public education in reducing cigarette usage, these limits are not being reached, largely because the cigarette companies have not met their responsibility to support and enhance this effort, but instead have worked to undermine it.

Among the types of information to which consumers are entitled are the specific fatal, disabling, or addictive diseases and conditions which the products can cause,<sup>22/</sup> and the likelihood that a person using the product will contract one of these afflictions.<sup>23/</sup> In the case of cigarettes, the manufacturers are responsible for

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<sup>22/</sup>See, e.g., MacDonald v. Ortho Pharmaceutical Corp., 394 Mass. 131, 475 N.E.2d 65, cert. denied 474 U.S. 920 (1985)(disabling stroke), Crocker v. Winthrop Laboratories, 514 S.W.2d 429 (Tex. 1974) (addiction to prescription drug).

<sup>23/</sup>See MacDonald v. Ortho Pharmaceutical Corp., n. 22, supra, 475 N.E.2d at 70: "Thus, the manufacturer's duty is to provide to the consumer written warnings conveying reasonable notice of the nature, gravity, and likelihood of known or knowable side effects."



informing consumers that smoking causes many forms of cancer, as well as heart attacks, strokes, arterial diseases, emphysema and chronic bronchitis, that it is highly addictive, and that it causes severe harm to fetuses, young children, and others inadvertently exposed to the toxins and carcinogens in cigarette smoke.<sup>24/</sup> While most Americans today know about most of these dangers:

[S]ubstantial numbers of smokers are still unaware of or do not accept important health risks of smoking. For example, the proportions of smokers in 1986 who did not believe that smoking increases the risk of developing lung cancer, heart disease, chronic bronchitis, and emphysema were 15 percent, 29 percent, 27 percent, and 15 percent, respectively. These percentages correspond to between 8 and 15 million adult smokers in the United States.<sup>25/</sup>

Equally important, cigarette companies are obliged to inform consumers not only about the nature of the dangers posed by their products, but about the extent of

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<sup>24/</sup>See, e.g., U.S. Dep't of Health and Human Serv., Reducing the Health Consequences of Smoking: 25 Years of Progress. A Report of the Surgeon General (1989) at 98 - 99.

<sup>25/</sup>Id. at 244.

these dangers as well. For consumers to be able to make a reasoned choice whether to smoke, they must understand both the absolute risks to themselves of smoking,<sup>26/</sup> and how these risks compare to other risks they encounter in daily life.

[M]ost adults underestimate the impact of smoking on longevity, according to a 1980 Roper survey. In this survey, 30 percent of the population and 41 percent of smokers did not know that a typical 30-year-old smoker shortened his life expectancy at all by smoking. Among those who did know that smoking reduces one's life expectancy, many underestimated the degree to which this is true.<sup>27/</sup>

As consumers obtain more complete and accurate information about the dangers of smoking, cigarette

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<sup>26/</sup>"Absolute risks can be described by the proportion of those exposed to a given factor who will actually die or develop the particular condition, or by the reduction of life expectancy caused by exposure. As many as one-third of heavy smokers aged 35 years will die before age 85 of diseases caused by their smoking, and 30-year-old smokers will shorten their lives an average of 6 to 8 years if they smoke a pack a day." Id. at 206 (references omitted).

<sup>27/</sup>Id. at 206

consumption -- along with its associated morbidity and mortality -- declines. Thus, the 1989 Surgeon General's Report estimated that, "By 1987, adult per capita cigarette consumption would have exceeded its actual level by an estimated 79 to 89 percent had the antismoking campaign never occurred."<sup>28/</sup>

These public health gains have all been achieved in the face of the cigarette companies' best efforts to muddy the waters. Youngsters experimenting with cigarettes, and smokers thinking about quitting, are encouraged to avoid confronting the unpleasant truths about the health effects of smoking. Smoking has not been proven to cause lung cancer or other diseases, insists the cigarette industry, and the Surgeon General and other public health authorities are simply mistaken in thinking that it has. See section C, supra.

Thus, while it is not possible to quantify in advance the public health benefits -- in terms of reduced

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<sup>28/</sup>Id. at 661 - 662. As a result of the decreased consumption caused by the antismoking campaign, "an estimated 789,000 deaths were postponed during the period 1964 through 1985", where "[t]he average life expectancy gained per postponed death was 21 years", and "[c]ampaign-induced quitting and noninitiation through 1985 will result in the postponement or avoidance of an estimated 2.1 million smoking-related deaths between 1986 and the year 2000." Id.

consumption, morbidity and mortality -- from holding cigarette companies to the same common law consequences as other manufacturers, they plainly will be substantial.

## CONCLUSION

The judgment of the court of appeals upholding the respondents' claim of preemption should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

S. Stephen Rosenfeld  
Stern, Shapiro, Rosenfeld  
& Weissberg  
80 Boylston Street  
Suite 910  
Boston MA 02116  
(617) 542-0663

Richard A. Daynard  
Northeastern University  
School of Law  
400 Huntington Avenue  
Boston MA 02115  
(617) 437-2026

Attorneys for the Amici  
Six Former United States  
Surgeons General, the  
American Council on  
Science and Health, and  
the Tobacco Products  
Liability Project

APPENDIX



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### How To Fully Enjoy The Cleaner Smoke

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- For best results, we recommend using a good quality butane lighter like the disposable ~~Solo~~ ELECTRA™ XL. Matches and other lighters can be used but may cause the filter to appear gray due to impurities in the flame. Car lighters do not work.
- Hold the flame to Premier a second or two longer than you normally would, until an ash begins to form.
- Since the tobacco doesn't burn, Premier does not burn down. Yet it smokes just as long as other king-size cigarettes.

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PTD IN USA 10140000

Introducing  
Premier  
The  
Cleaner  
Smoke

COVER

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### The Cleaner Smoke Experience

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Premier is the remarkable breakthrough that ushers in a whole new era of smoking enjoyment — *cleaner* enjoyment than you may have ever thought possible. We're confident that you will appreciate the cleaner taste, the cleaner aroma, the cleaner feel of new Premier. Enjoy Premier for a week and discover the new pleasure of cleaner smoking.

0.4 mg. nicotine av. per cigarette  
by FTC method.

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### What is "Cleaner Smoke"?

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Premier is the first cigarette you smoke by *heating tobacco — not burning it.*

It's a breakthrough that changes the very composition of cigarette smoke — substantially reducing many of the controversial compounds found in the smoke of tobacco-burning cigarettes. Those that remain include carbon monoxide, but the amount of carbon monoxide is no greater than in the best-selling "lights."

What it all comes down to is a cleaner smoke — for you and everyone around you.

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### Important Information About New Premier

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- Do not smoke a bent, crushed or damaged Premier. A Premier cigarette that has been damaged, particularly at the lighting end, will not smoke properly and could result in a hot ember falling out and burning something. Please return damaged packs to us for free replacement.
- As with any cigarette, avoid contacting the lit end with anything that will burn.
- You will know your Premier is out when it is no longer warm and you no longer get smoke. Be sure it is out before discarding and please dispose of properly.

INSIDE

PACKAGE INSERT

TWO FOLDS

16  
No. 90-1033

FILED

JUL 10 1991

CLERK OF THE COURT

**In the Supreme Court of the United States**

**OCTOBER TERM, 1991**

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**THOMAS CIPOLLONE, PETITIONER**

**v.**

**LIGGETT GROUP, INC., ET AL., RESPONDENTS**

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**ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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**BRIEF FOR THE PRODUCT LIABILITY  
ADVISORY COUNCIL, INC., AS  
AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

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**KENNETH S. GELLER**

*Counsel of Record*

**MARK I. LEVY**

*Mayer, Brown & Platt*

*2000 Pennsylvania Avenue, N.W.*

*Washington, D.C. 20006*

*(202) 463-2000*

*Counsel for Amicus Curiae*

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**BRIEF FOR THE PRODUCT LIABILITY  
ADVISORY COUNCIL, INC., AS  
AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

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**INTEREST OF THE AMICUS CURIAE**

Pursuant to Rule 37.3 of the Rules of this Court, the Product Liability Advisory Council, Inc. ("PLAC"), respectfully submits this brief as *amicus curiae* in support of respondents. The parties have consented to the filing of this brief, and their written consents have been filed with the Clerk of the Court.

PLAC is a non-profit membership association of approximately 80 major industrial companies.<sup>1</sup> Formed in 1983, PLAC's principal purpose is to submit briefs as *amicus curiae* in appellate cases involving significant issues affecting the law of product liability. PLAC has participated as *amicus curiae* in numerous cases in this Court, the federal courts of appeals, and state appellate courts.

PLAC and its members have a strong interest in the development of sound legal principles governing procedural and substantive issues arising in product liability cases. In particular, PLAC is vitally concerned about the issue of federal preemption of state tort claims. PLAC and its members have been involved in numerous product liability and other cases that present issues of federal preemption.

Because of PLAC's substantial interest in the outcome of this case, and because of its extensive experience in product liability suits, PLAC is able to provide an additional and broader perspective on the important issues presented. PLAC believes that its *amicus* brief will be of assistance to the Court in analyzing and resolving these issues.

**INTRODUCTION AND SUMMARY OF ARGUMENT**

The question in this case is not whether cigarette manufacturers should be subject to legal obligations relating

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<sup>1</sup> A list of PLAC's members is included in the Appendix to this brief.



to their communications with the public about the health dangers of smoking cigarettes. Rather, the sole question is: *who decides* what communications are appropriate? In our view, Congress itself has made that decision in the Federal Cigarette Labeling and Advertising Act by drafting, monitoring, and revising the required warning label in order to ensure its adequacy. Furthermore, to provide national uniformity and protect interstate commerce, Congress intended the Act to set forth an exclusive warning regime that displaces state law concerning the health aspects of cigarette labeling and the promotion or advertising of cigarettes. If our submission is correct, respondents—whose warning labels concededly conform to the requirements of the Act—have complied fully with federal law and may not be subject to inconsistent regulation under state law.

Petitioner and his *amici* concede that the Labeling and Advertising Act preempts state statutes and regulations imposing warning requirements on cigarette packages or in cigarette advertising. Nevertheless, they assert that the Act does not displace the state common law of torts imposing the identical requirements. Under this position, it would be up to judges and juries in 50 different states to determine the adequacy of warnings or advertising on a case-by-case basis, and in doing so they would be entirely free to disregard the federal warning scheme and to conclude that “better” warnings should have been provided notwithstanding Congress’s determination that the federally-required warning label is adequate.

Petitioner’s approach cannot be reconciled with the express statement of purpose and preemption provision in the Act and, contrary to the system Congress clearly contemplated, represents a prescription for disuniformity and onerous burdens on interstate commerce. Whether analyzed under principles of “express” preemption (because the Act expressly preempts state law), “occupation of the field” preemption (because Congress occupied the field of the health-related aspects of cigarette labeling, advertising and promotion), or “implied” preemption (be-

cause state tort law would frustrate the purposes of the Act), petitioner’s reading of the federal statute cannot stand.

Moreover, petitioner’s submission that the Labeling and Advertising Act does not preempt state tort law is predicated on several erroneous propositions that are of substantial importance in preemption cases generally.

First, petitioner contends that the term “State law” does not include state common law. This counterintuitive contention is belied both by the plain meaning of the words used and by the precedents of this Court.

Second, petitioner argues that state tort law does not “require” defendants to observe a state-imposed standard of conduct because they can “choose” to engage in tortious activity so long as they are willing to pay the resulting damages awards. This argument ignores hornbook law on the “duties” imposed under state tort law, incorrectly assumes that tort law is indifferent to the repeated and intentional commission of torts, and is flatly inconsistent with the numerous decisions of this Court holding that state tort damages are regulatory in nature and thus are preempted if they are at odds with a federal statutory scheme.

Third, petitioner urges that preemption is inappropriate if Congress does not provide an alternative remedy in lieu of the traditional state law that is displaced. But Congress on many occasions has preempted a state-law remedy without enacting a federal substitute. In addition, the premise of petitioner’s argument is incorrect, because the Labeling and Advertising Act does contain effective alternative remedies.

Finally, petitioner asserts that state tort claims would promote the objectives of the federal statute by providing more information to the public about the relationship between smoking and health. Congress’s purpose, however, was to inform the public while at the same time protecting the national economy against diverse and burdensome

warning requirements, and state tort law would plainly conflict with the latter objective. In any event, it is no answer to preemption "to say that the ultimate goal of both federal and state law is" the same, for "state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach th[at] goal." *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). Here, there can be no doubt that Congress determined that the best way to achieve its goal was by requiring a simple, uniform, nationwide warning on every cigarette package and by prohibiting the states from regulating any health-related aspect of cigarette advertising or promotion.

In the end, all of petitioner's linguistic hide-and-seek games—pretending that "common law" is not law, that duties imposed by state tort law involve no "requirements," that additions to the federal warning made in response to tort liabilities should be deemed "voluntary"—are simply props for an artificial analytical framework, under which state tort law cannot be preempted unless Congress uses magic words such as "common law" or "tort liability." This Court has never accepted that approach in ruling on a preemption claim. Petitioner and his *amici* simply cannot explain why Congress would have wanted to preempt state statutes and regulations that impose different or additional requirements on cigarette labeling, advertising or promotion, yet would have cheerfully agreed to the spectacle of judges and juries across the country imposing the very same requirements in the guise of adjudicating common law claims.

### ARGUMENT

After extended consideration, Congress determined that the best way to inform the public about the "relationship between smoking and health" while protecting "commerce and the national economy" from "diverse, nonuniform, and confusing cigarette labeling and advertising regulations" was to "establish a comprehensive Federal Program to deal with cigarette labeling and advertising." 15

U.S.C. § 1331. To effectuate those goals, Congress *itself* prescribed the precise words of warning to be placed on each package of cigarettes (15 U.S.C. § 1333) and required the Federal Trade Commission and the Secretary of Health and Human Services to report to it annually about cigarette promotion and advertising practices and current information on the health consequences of smoking and to make recommendations for legislation. 15 U.S.C. § 1337. Finally, Congress enacted an express preemption provision prohibiting the states from requiring *any* other statement "relating to smoking and health \* \* \* on any cigarette package" or imposing *any* "requirement or prohibition based on smoking and health" with respect to the "advertising or promotion of any cigarettes" whose packages are labeled in conformity with the federal statute. 15 U.S.C. § 1334.

Despite the comprehensiveness of this federal program, the clarity of Congress's purpose to reserve to the federal government the regulation of "cigarette labeling and advertising with respect to any relationship between smoking and health" (15 U.S.C. § 1331), and the presence of a broadly-worded preemption provision, petitioner asserts that Congress did not intend to foreclose claims under state *tort* law that the labeling or advertising of cigarettes misinformed consumers about the dangers of smoking. In petitioner's view, Congress's meticulously calibrated judgment as to the health warning that cigarette manufacturers should be required to give must be respected by state legislatures and administrative agencies but may be freely disregarded by state courts and juries enforcing duties derived from amorphous and divergent common law standards of "adequacy." This approach would authorize the states to impose sanctions on manufacturers by finding that the warning Congress expressly determined to be adequate is in fact *inadequate* as a matter of state law. Such assaults on the integrity of the "comprehensive Federal Program" created by Congress are incompatible with the words of the Labeling and Advertising Act and would deeply subvert its purposes.



Petitioner defends this bizarre result by presenting an analytical structure (Pet. Br. 14-16) that rests on a rigid and artificial compartmentalization of the various types of preemption. As respondents demonstrate, however, the Court's familiar three-part preemption formulation was never intended to be applied in so wooden or literal a manner. See *English v. General Electric Co.*, 110 S. Ct. 2270, 2275 n.5 (1990) ("[b]y referring to these three categories, we should not be taken to mean that they are rigidly distinct"). Rather, the question here turns solely on the purposes of Congress, to be resolved through the normal tools of statutory construction. See *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 482 (1990); *Rice v. Rehner*, 463 U.S. 713, 718 (1983). We submit that the language, structure and purpose of the Labeling and Advertising Act leave no doubt that petitioner's warning and advertising claims are preempted. Whether viewed as a question of "express preemption," "conflict preemption," or "occupation of the field," the conclusion is inescapable that federal law cannot coexist with state tort claims challenging health-related aspects of the labeling, advertising or promotion of cigarettes.

**I. THE CIGARETTE LABELING AND ADVERTISING ACT EXPRESSLY PREEMPTS STATE LAW, INCLUDING STATE COMMON LAW, CONCERNING THE HEALTH ASPECTS OF CIGARETTE WARNING LABELS AND THE PROMOTION OR ADVERTISING OF CIGARETTES**

On its face, the Cigarette Labeling and Advertising Act contains a broad and unqualified preemption provision:

- (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
- (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334. In light of this statutory language, petitioner concedes, as he must, that the Act *expressly* "prohibits states from regulating cigarette packaging, and cigarette advertising." Pet. 4. Nevertheless, petitioner asserts that there is no express preemption in this case because Section 1334 does not explicitly refer to state common law tort claims. This literalistic approach misapprehends the nature of express preemption.

**A. The Phrase "State Law" Includes State Common Law.**

Section 1334(a) and (b) as originally enacted in 1965, and Section 1334(a) as retained in 1969, are expansive in scope and contain no limitation on the type of law that is subject to preemption. Thus, in singularly sweeping and unambiguous language, they provide that "[n]o statement relating to smoking and health"—whether under federal, state, or local law, and whether statutory, administrative, or common law in nature—may be imposed in addition to the federally required warning.

Section 1334(b) as amended in 1969 leaves no more room to carve out an exception for state common law. By its terms, this preemption provision encompasses *any* requirement or prohibition based on smoking and health "under State law" with respect to the advertising or promotion of cigarettes. Although petitioner offers the half-hearted argument (Br. 24) that state common law is not really "State law," this Court's cases foreclose that contention. As the Court recently explained in holding that the Interstate Commerce Act's reference to "all other law, including State and municipal law," includes state common law:

As always, we begin with the language of the statute \* \* \*. [The phrase] "all other law, including State and municipal law," is clear, broad, and unqualified. It does not admit of the distinction the Court of Appeals drew \* \* \* between positive enactments and common-law rules of liability.



*Norfolk & W. R. Co. v. Train Dispatchers*, 111 S. Ct. 1156, 1163 (1991). See also, e.g., *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) (“[w]e see no reason not to give ‘laws’ its natural meaning \* \* \*, and therefore conclude that \* \* \* [it embraces] claims founded upon \* \* \* common law as well as those of statutory origin”); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 71, 79 (1938) (citation omitted) (law includes “the unwritten law of the State as declared by its highest court \* \* \*. ‘[T]he authority and only authority is the State \* \* \* whether it be of its Legislature or of its Supreme Court’”).

Of course, as petitioner points out (Br. 18), Section 1334 does not refer *in haec verba* to state common law. But neither does it refer to state statutes or regulations, both of which petitioner admits are expressly preempted. In either event, it is simply a question of statutory construction to determine the meaning of Congress’s enactment. If, as plainly is the case, state common law is subsumed within the generic term “State law,” it is subject to the express preemption provision in Section 1334.<sup>2</sup>

#### **B. The Common Law Of Torts Imposes “Requirements” And “Prohibitions.”**

Since “State law” unquestionably includes state common law, petitioner resorts to the term “required” or “re-

<sup>2</sup> Although petitioner does not seriously contend that the term “State law” in the Labeling and Advertising Act does not encompass state common law, several of his *amici* attempt to develop the argument. According to this view, all judicial action grounded in state common law—apparently including injunctive relief—is outside the preemptive scope of the Act. See Am. Br. of National League of Cities, *et al.*, at 15, 18 n.10; Am. Br. of American Cancer Society, *et al.*, at 12 n.2, 25 n.9. For the reasons outlined above, nothing in the text of the Act suggests in any way that Section 1334 is confined to state statutes and regulations or that Congress intended *sub silentio* to enact a broad loophole for state common law in the otherwise all-inclusive phrase “State law.” Indeed, it is difficult to take seriously the idea inherent in *amici*’s argument that a mandatory injunction under state common law, enjoining the defendant to provide warnings in the future different from or in addition to those prescribed in the federal statute, would not be preempted.

quirement” in Section 1334. In his view, the state common law of torts does not “require” defendants to conform their conduct to state-created and state-enforced standards because, in contrast to statutes and regulations, it does not contain “[t]he element of compulsion.”

[C]ommon law product liability lawsuits do not compel specific behavior. Such lawsuits operate primarily to compensate injured individuals; they do not regulate. \* \* \* Damage awards in product liability suits do not compel any behavior other than the payment of money damages. Cigarette manufacturers are free to build these damage awards into the price of their product and do nothing else or, alternatively, they may with unconstrained choice attempt to reduce the likelihood of future adverse verdicts.

Pet. Br. 19, 20-21 (citations omitted); see also *id.* at 40-42. This argument is ridiculous, bears little relation to reality, and cannot be squared with either general legal principles or the settled decisions of this Court.<sup>3</sup>

It is elementary learning that tort liability may be imposed only if the defendant has violated a duty owed to the plaintiff. Indeed, the very authority cited by petitioner (Br. 20) makes clear that “torts consist of the breach of *duties fixed and imposed upon the parties by the law itself.*” W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *PROSSER AND KEETON ON THE LAW OF TORTS* 4 (5th ed. 1984) (emphasis added). See also, e.g., *BLACK’S LAW DICTIONARY* 1335 (5th ed. 1979) (“Tort” is defined to be “[a] violation of a duty imposed by general law \* \* \*. There must always be a violation of some duty owing to plaintiff”).

<sup>3</sup> Insofar as petitioner’s argument is premised on the notion that defendants can “continue with business as usual \* \* \* and build the damages into the cost of the product” (Br. 42), it apparently would not distinguish tort damages from civil monetary penalties or criminal fines (which, at least as to corporate defendants, constitute the applicable criminal sanction). Yet petitioner concedes that statutes or regulations imposing warning requirements and containing purely monetary penalties would be preempted by Section 1334.

Thus, contrary to the crux of petitioner's position, a duty imposed under the state common law of torts inherently embodies the notion of requirement or obligation. Tort law sets "the conduct *required* of the actor by society for the protection of others." PROSSER AND KEETON at 22 (emphasis added). See also, *e.g.*, RESTATEMENT (SECOND) OF TORTS § 4 (1965) (emphasis added) ("[t]he word 'duty' \* \* \* denote[s] the fact that the actor is *required to conduct himself in a particular manner* at the risk that if he does not do so he becomes subject to liability"); BLACK'S LAW DICTIONARY at 453 (emphasis added) (in tort cases the "term ['duty'] may be defined as *obligation*, to which law will give recognition and effect, *to conform to a particular standard of conduct* toward another"). Accordingly, a court or jury deciding a state tort case cannot rule in favor of the plaintiff without finding that the defendant violated a requirement of state law—for example, in a failure-to-warn case, a state common-law duty to provide a warning different from or in addition to that prescribed by Congress in the Labeling and Advertising Act. State law both imposes the requirement and enforces it through a judgment against the defendant.

Moreover, the law is not, as petitioner would have it, indifferent to defendants' continued tortious conduct and does not afford them an "unconstrained choice" (Pet. Br. 20) between conforming to their legal duty or paying damages. By definition, a tort is "[a] private or civil wrong" (BLACK'S LAW DICTIONARY at 1335) that the law seeks to discourage, and the payment of compensatory damages does not change the wrongful nature of the tortious conduct or legitimize its occurrence.

[W]hen \* \* \* [one] act[s] negligently or inflict[s] an intentional harm, he or she wrongs the sufferer. The payments exacted by tort law are not taxes or licensing fees for acts that are permitted on condition that the defendants pay for damage thereby caused. A tort is an act that wrongs the victim. The defendant owes the plaintiff a duty, operative at the moment of action, to abstain from committing such

an act. The obligation to compensate is the juridical reflex of an antecedent obligation not to wrong.

Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403, 409 (1989). The condemnatory force of tort law is made clear by the doctrine of punitive damages, which are designed to punish and deter reprehensible conduct. See, *e.g.*, *Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979). A defendant that followed petitioner's advice—and thus chose to continue, intentionally and repeatedly, to engage in tortious conduct—would quickly (and justifiably) find itself subjected to ever-increasing punitive damages awards.

Consistent with these accepted precepts, it is a well-recognized purpose of tort law to regulate conduct to conform to state-established legal standards. One leading commentary has summarized the regulatory effect of tort law in the following way:

The "phosphylactic" factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm.

PROSSER AND KEETON at 25. Thus, as the First Circuit aptly stated in rejecting the identical argument that defendants have a "free choice" to comply with tort law or pay repeated damages awards, the verdict "effectively compels the manufacturer to alter its warning to conform to different state law requirements as 'promulgated' by a jury's findings."

[Plaintiffs] disingenuously maintain that any monetary damages awarded would not compel a manufacturer to change its label for, after all, "the choice of how to react is left to the manufacturer." This "choice of reaction" seems akin to the free choice of coming up for air after being underwater. Once a jury has found a label inadequate under state law,



and the manufacturer liable for damages for negligently employing it, it is unthinkable that any manufacturer would not immediately take steps to minimize its exposure to continued liability.

*Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 627-628 (1st Cir. 1987). Indeed, several of petitioner's amici unabashedly concede that state tort law imposes legal duties that affect defendants' conduct, and they trumpet that result as the reason why petitioner's common law claims should be allowed.<sup>4</sup>

It therefore is not surprising that this Court consistently has held that state tort damages are regulatory in effect and require defendants to conform their behavior to state tort law. The seminal case in this area is *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), which held that an award of damages in a state tort action was preempted by federal labor law. Focusing "on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted" (*id.* at 243), the Court explained (*id.* at 246-247 (emphasis added)):

Nor is it significant that California asserted its power to give damages rather than to enjoin what the [National Labor Relations] Board may restrain though it could not compensate. Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. *Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm*

<sup>4</sup> See Am. Br. of Minnesota, *et al.*, at 1, 4; Am. Br. of National League of Cities, *et al.*, at 25, 26; Am. Br. of Surgeons General, *et al.*, at 3; Am. Br. of Trial Lawyers for Public Justice, at 13, 15; Am. Br. of American Medical Association, at 9; Am. Br. of American Cancer Society, *et al.*, at 16.

cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

This Court has never deviated from the *Garmon* principle, holding time and again that state common-law damages actions have a regulatory effect and are preempted if they are at variance with the federal scheme. See, e.g., *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982); *Chicago & N.W. Trans. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981); *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525 (1959); see also *New York Times Co. v. Sullivan*, 376 U.S. 254, 277-278 (1964) (holding that common law claims are "a form of regulation" and that "fear of damage awards" may be "markedly more inhibiting than the fear of prosecution"). As the Court has correctly understood, "[a] system under which each State could, through its courts, impose \* \* \* its own version of reasonable \* \* \* requirements could hardly be more at odds with the uniformity contemplated by Congress." *Kalo Brick*, 450 U.S. at 326.<sup>5</sup>

The Court recently has reaffirmed the *Garmon* analysis. For example, *International Paper Co. v. Ouellette*, 479 U.S. 481, 495, 498-499 n.19 (1987)—a case petitioner virtually ignores—squarely rejected the contention that "compensatory damages only require the [defendants] to pay \* \* \* and thus do not 'regulate'." As the Court stated (emphasis added):

[If the preempted state remedies were available], at a minimum IPC would have to change its methods of doing business and controlling pollution to avoid the threat of ongoing liability. \* \* \* *The inevitable result of such suits would be that Vermont and other*

<sup>5</sup> *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988), is fully consistent with this position. The Court acknowledged in *Goodyear* that the occasional state workers' compensation award would exert "incidental regulatory pressure" (*id.* at 186) on a federally-owned nuclear production facility, but it concluded that Congress had determined that such incidental regulatory effects were "acceptable"—i.e., were not in variance with the federal scheme. *Ibid.* See also *id.* at 186 n.8.



*States could do indirectly what they could not do directly—regulate the conduct of out-of-state sources.*

¶ Although t]he District Court concluded that the interference with the Act is insignificant, in part because respondents are seeking to be compensated for a specific harm rather than trying to “regulate” \* \* \* [,] [w]e decline \* \* \* to draw a line between the types of relief sought. \* \* \* *If the Vermont court determined that respondents were entitled only to the requested compensatory relief, IPC might be compelled to adopt different or additional means of pollution control from those required by the Act, regardless of whether the purpose of the relief was compensatory or regulatory.* \* \* \* [T]his result would be irreconcilable with the [Clean Water Act’s] exclusive grant of authority to the Federal Government \* \* \*.

Similarly, in *Ingersoll-Rand Co. v. McClendon*, *supra*, the Court observed that “[i]t is foreseeable that state courts, exercising their common law powers, might develop different substantive standards” from federal law, thus “requiring the tailoring of \* \* \* [defendants’] conduct to the peculiarities of the law of each jurisdiction. Such an outcome is fundamentally at odds with the goal of uniformity that Congress sought to implement.” 111 S. Ct. at 484. See also *International Union, UAW v. Johnson Controls*, 111 S. Ct. 1196, 1209 (1991) (referring to “tort liability” as a state “requirement[]” that is subject to preemption).<sup>6</sup>

<sup>6</sup> Petitioner’s efforts to distinguish *Garmon* (Br. 21-22 & n.23) cannot withstand analysis. Petitioner asserts that *Germon* has no precedential effect outside the area of the National Labor Relations Act, but the Court has relied upon *Garmon* in many non-NLRA cases. Petitioner is equally wrong that *Garmon* is no longer good law. See *International Longshoremen’s Ass’n v. Davis*, 476 U.S. 380, 381 (1986); *Farmer v. Carpenters*, 430 U.S. 290, 297 (1977). Finally, the cases cited by petitioner represent only one branch of the *Garmon* doctrine, which applies if the activity in question is “a merely peripheral concern” of federal law or touches “deeply rooted” local interests; this doctrine “involves protecting the pri-

### C. Construing Section 1334 To Exclude Common Law Claims Would Lead To Absurd Results.

Petitioner’s interpretation, by engrafting an exception onto Section 1334 for state common law, would render the statutory scheme inherently incongruous and would produce highly anomalous consequences. Needless to say, “courts should strive to avoid attributing absurd designs to Congress, particularly when the language of the statute and its legislative history provide little support for the proffered, counterintuitive reading.” *Sheridan v. United States*, 487 U.S. 392, 402 n.7 (1988). See also *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 776 (1983) (“[w]e cannot attribute to Congress the intention to \* \* \* open the door to such obvious incongruities and undesirable possibilities”) (citation omitted).

It is irrational to attribute to Congress, as petitioner does, the intent to vest in lay juries—while denying to democratically elected state legislatures and expert state administrative agencies—the power to review the adequacy of disclosures made pursuant to the federally-prescribed warning or cigarette advertising and, if they are found wanting, to determine for themselves on a case-by-case basis what different or additional disclosures are necessary. The First Circuit correctly understood that

many jurisdiction of the NLRB, and requires a balancing of state and federal interests.” *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 214 n.9 (1985). The other branch of *Garmon*, and the one relevant here, reflects “‘federal protection of the conduct in question.’” *Farmer*, 430 U.S. at 295 n.5. Despite this Court’s admonition that “‘care must be taken to distinguish’” the two concepts (*ibid.*), petitioner “confuses preemption which is based on actual federal protection of the conduct at issue from that which is based on the primary jurisdiction of the [NLRB].” *Brown v. Hotel Employees*, 468 U.S. 491, 502 (1984). Where a substantive federal rule is at issue, as it is here, “the balancing of state and federal interests \* \* \* is irrelevant, since Congress, acting within its power under the Commerce Clause, has provided that federal law must prevail” (*Allis-Chalmers*, 471 U.S. at 214 n.9); in that situation “[t]he relative importance to the State of its own law is not material.” *Brown*, 468 U.S. at 503 (citation omitted).

"[i]t is inconceivable that Congress intended to have [its] carefully wrought balance of national interests superseded by the views of a single state, indeed, perhaps of a single jury in a single state. \* \* \* [Plaintiff's argument] arrogates to a single jury the regulatory power explicitly denied to all fifty states' legislative bodies." *Palmer*, 825 F.2d at 626, 628.

In fact, state tort actions would be a particularly undesirable and uncertain form of regulation: it is difficult to ascertain exactly what common-law duty is embodied in a general jury verdict, especially given the "often \* \* \* 'vague' and 'indeterminate' \* \* \* standards" (*Ouellette*, 479 U.S. at 496) that juries apply under state common law. Ironically, petitioner and his *amici* extol the very inscrutability of jury verdicts as a virtue rather than a vice, but their efforts cannot obscure this fatal defect in their position. See Pet. Br. 41-42; Am. Br. of Trial Lawyers for Public Justice, at 13. Without question, manufacturers confronted with damages awards based on the claim that their warnings or advertising misinformed the public would attempt to alter their practices in an effort to deal with the problem.

Petitioner's reading of Section 1334 would lead to other anomalies as well. Under his view, for instance, a \$100 fine for failure to provide a warning required by state statute would be preempted, but a \$1 million damages award for failure to warn pursuant to state common law would not be. And a state court would be entirely free to establish such additional warnings in adjudicating a tort claim, but the state legislature would be barred from incorporating—or revising—those warning requirements in legislation. Petitioner's narrow and unnatural reading of the express preemption provision spawns, and offers no solution to, these peculiar and unimagined results.<sup>7</sup>

<sup>7</sup> Petitioner's approach also forces him to distinguish between judicially awarded injunctions (which he concedes are preempted) and judicially imposed damages (which he contends are not). See Pet. Br. 19-20. This Court, however, has "decline[d] \* \* \* to draw a line [for preemption purposes] between the types of relief sought,"

Construing Section 1334 to include state common law, by contrast, avoids such absurd consequences by recognizing what petitioner and his *amici* blindly refuse to acknowledge—that tort actions impose legal requirements or prohibitions just as much as state statutes and regulations and are preempted when they are incompatible with a federal statutory scheme. That principle provides a compelling refutation of petitioner's argument and serves as the background against which Congress enacted the preemption provision in the Labeling and Advertising Act. See, e.g., *Miles v. Apex Marine Corp.*, 111 S. Ct. 317, 325 (1990) ("[w]e assume that Congress is aware of existing law when it passes legislation"). If Congress had intended to depart from that well-settled principle, it surely would have said so. See *Chisom v. Roemer*, No. 90-757 (June 20, 1991), slip op. 14; *United Savings Ass'n v. Timbers of Inwood Forest*, 484 U.S. 365, 380 (1988).<sup>8</sup>

#### **D. Petitioner's Maxims Of Statutory Construction Do Not Justify The Exclusion Of Common Law Claims.**

In the face of this compelling showing that the Labeling and Advertising Act expressly preempts state common law tort claims, petitioner advances three grounds to support a contrary conclusion. First, petitioner relies on a "presumption against preemption," asserting that a "[c]ongressional intent to override this presumption must

specifically concluding that preemption principles do not distinguish between "injunctive relief" and "compensatory damages." *Ouellette*, 479 U.S. at 498 n.19. See also *Kalo Brick*, 450 U.S. at 317-318 (citation omitted) (preemption focuses on "the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted").

<sup>8</sup> Petitioner's position also conspicuously ignores Congress's omission from the Labeling and Advertising Act of any savings clause preserving state common law remedies. Of course, even the presence of a savings clause would not preserve tort remedies that are inconsistent with the Act. See, e.g., *Ouellette*, 479 U.S. at 492-493; *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 230 (1986); *Kalo Brick*, 450 U.S. at 328, 330; *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915); *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907).



be expressed with drastic clarity." Pet. Br. 13, 18. Whatever validity this "presumption" may have in other contexts, where Congress's intent to displace state law in a given area remains insolubly ambiguous after a court has employed the usual tools of statutory construction, it is plainly inapplicable here. Congress has enacted a broad express preemption provision that unquestionably reflects its intent to prohibit state regulation of cigarette warnings and advertising—matters covered by a "comprehensive Federal Program" (15 U.S.C. § 1331).

Petitioner also contends (Br. 18, 23) that preemption is especially disfavored in areas of "traditional 'police regulation,'" such as protection of the public health. It is well settled, however, that "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *de la Cuesta*, 458 U.S. at 153 (citation omitted). See also *Felder v. Casey*, 487 U.S. 131, 138 (1988); *De Canas v. Bica*, 424 U.S. 351, 357 (1976) ("even state regulation designed to protect vital state interests must give way to paramount federal legislation"); *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 638 (1973) (finding preemption of authority "deep-seated in the police power of the States"). It is undisputed that the Labeling and Advertising Act preempts state statutes and regulations that are designed, through the imposition of requirements related to the labeling, advertising or promotion of cigarettes, to protect the public health; petitioner has offered absolutely no reason why state common law requirements should be regarded as sacrosanct and given a preferred place in the hierarchy of federalism values.

Finally, petitioner argues (Br. 22 n.23) that common law claims may be preempted only where Congress has provided an "alternative remedy" and that the Labeling and Advertising Act supplies no such remedy. Both of these propositions are incorrect.

To begin with, this Court often has found preemption "even when the state action purported to authorize a remedy unavailable under the federal provision." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 55 (1987). In *Caterpillar Inc. v. Williams*, 482 U.S. 386, 391 n.4 (1987), for example, the Court overturned a court of appeals' decision rejecting preemption "unless the federal cause of action relied upon provides the plaintiff with a remedy"; in so ruling the Court emphasized that federal law is preemptive despite the fact that "the relief sought by the plaintiff could be obtained only" under state law. This principle has been consistently followed. See, e.g., *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 287, 289 (1986); *Operating Engineers v. Jones*, 460 U.S. 669, 684 (1983); *Kalo Brick*, 450 U.S. at 322-323; *Farmer v. Carpenters*, 430 U.S. 290, 298-299, 304 (1977); *WDAY*, 360 U.S. at 535. At least since *Garmon*, the law has been settled that "[e]ven the States' salutary effort to redress private wrongs or grant compensation for past harm" cannot justify state intrusion into a federal regulatory system notwithstanding that "the state remedy ha[s] no federal counterpart." 359 U.S. at 247. See also *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 584 (1981) ("a finding that federal law provides a shield for the challenged conduct will almost always leave the state-law violation unredressed"); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 154-155 (1964) (Jones Act preempts state law even though plaintiff had no cause of action under the Act).

In any event, petitioner's argument is misguided even on its own terms, because the Labeling and Advertising Act in fact contains effective alternative remedies. First, it provides a preventive remedy in the form of a mandatory warning—a warning that Congress itself drafted and determined to be adequate to protect the public health. If a court in a traditional failure-to-warn case enjoined the defendant to furnish a particular warning, it could hardly be said that there had been no relief. The federal statute legislatively affords the same remedy. Second, the



Act expressly preserves the authority of the Federal Trade Commission "with respect to unfair or deceptive acts or practices in the advertising of cigarettes." 15 U.S.C. § 1336. Congress fully expected that advertising or promotion that might undermine the effectiveness of the mandated warning would be monitored and prohibited at the national level.

At the end of the day, petitioner fails to provide any answer to the dispositive question: Why would Congress have painstakingly drafted a warning label that it considered to be adequate, required every cigarette manufacturer (on pain of civil and criminal penalties) to place that warning, and only that warning, on every package of cigarettes, and expressly preempted state statutes and regulations relating to the labeling, advertising and promotion of cigarettes in order to achieve uniformity in interstate commerce, and at the same time allowed state juries to reject the adequacy of the federal warning and create a regime of disuniformity by imposing diverse advertising requirements? Put another way, if Congress had intended to permit state law to supplement the information that cigarette manufacturers must provide to consumers, why would it have disabled state legislatures and administrative agencies from playing that role and allowed only state juries—rendering inscrutable verdicts in individual cases (see *Pet. Br.* 41-42)—to decide whether more or different information should have been given? The intrinsic incoherence of such a scheme is a convincing rebuttal to petitioner's argument. Both the language and purpose of the Labeling and Advertising Act, and settled principles of preemption, compel the conclusion that the Act expressly preempts state common-law torts.<sup>9</sup>

<sup>9</sup> This Court's decision in *Silkwood* does not warrant a different conclusion. As the opinion makes clear (464 U.S. at 249-256), and as the Court subsequently has explained, "the decision in *Silkwood* was based in substantial part on legislative history suggesting that Congress did not intend to include in the pre-empted field state tort remedies for radiation-based injuries." *English*, 110 S. Ct. at 2279.

## II. THE CIGARETTE LABELING AND ADVERTISING ACT IMPLIEDLY PREEMPTS STATE LAW, INCLUDING STATE COMMON LAW, CONCERNING THE HEALTH ASPECTS OF CIGARETTE WARNING LABELS AND THE PROMOTION OR ADVERTISING OF CIGARETTES

For the reasons given in Part I, it is unnecessary to look beyond the explicit language of 15 U.S.C. § 1334 to conclude that petitioner's state law tort claims, predicated on the inadequacy of the federally-mandated warning and alleged defects in respondents' advertising, are preempted by the Labeling and Advertising Act. Even in the absence of express preemptive language, however, "Congress' intent to supersede state law in a given area may nonetheless be implicit if a scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' " if

Although acknowledging the "tension" between state damages actions and exclusive federal regulatory authority (464 U.S. at 256), the Court in *Silkwood* nevertheless held that there was no preemption because it found that "Congress intended \* \* \* to tolerate [such] tension" (*ibid.*). In particular, the Court read the Price-Anderson Act—which established an indemnification scheme for nuclear operators held liable under state tort law—to constitute affirmative evidence of Congress's acceptance of state tort actions (*id.* at 251-256). Furthermore, the Atomic Energy Act of 1954 contains no preemption provision (see *Pacific Gas & Elec. Co. v. Energy Resources Comm'n*, 461 U.S. 190, 205 (1983)) and in fact explicitly preserves significant authority for the states (*e.g.*, 42 U.S.C. §§ 2018, 2021(b), 2021(k)). See *Kotler v. American Tobacco Co.*, 926 F.2d 1217, 1223 (1st Cir. 1990), petition for cert. pending, No. 90-1473 (filed Mar. 19, 1991).

Finally, the sole question in *Silkwood* was whether federal law preempted state *punitive* damages awards. It was common ground among the Justices that Congress intended to permit state tort claims for *compensatory* damages. Thus, *Silkwood* involved the availability of a particular remedy, not the question whether a state tort action was foreclosed by federal law. See *Palmer*, 825 F.2d at 628. Unlike the Atomic Energy Act as construed in *Silkwood*, the Labeling and Advertising Act contains no comparable indication of congressional intent to "tolerate [the] tension" (464 U.S. at 256) between federal and state law and unquestionably was designed to preempt state law in the area of health and smoking.

“‘compliance with both federal and state regulations is a physical impossibility,’” or if “state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *Wisconsin Public Intervenor v. Mortier*, No. 89-1905 (June 21, 1991), slip op. 5, 6 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963); and *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Petitioner’s tort claims are preempted on these grounds as well.

**A. The Labeling And Advertising Act Occupies The Field With Respect To The Health Aspects Of Cigarette Warning Labels And The Promotion Or Advertising Of Cigarettes.**

The principal defect in petitioner’s discussion of “occupation of the field” preemption is his faulty definition of the “field” at issue. As this Court has explained, “‘we must know the boundaries of th[e] field before we can say that [Congress] has precluded a state from the exercise of any power.’” *De Canas*, 424 U.S. at 360 n.8 (citation omitted). Preemption occurs for the “specific field” (*Wardair Canada v. Florida Dept. of Revenue*, 477 U.S. 1, 6 (1986)) or “particular area” (*California Federal Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 281 (1987)) that Congress has occupied. See also, e.g., *De Canas*, 424 U.S. at 357 n.5; *Pacific Gas & Electric*, 461 U.S. at 224 (Blackmun, J., concurring). The determination of the “‘boundaries’” of that field is a matter of statutory construction, and the Court “‘look[s] to the federal statute itself, read in the light of its constitutional setting and its legislative history.’” *De Canas*, 424 U.S. at 360 n.8 (citation omitted).

Applying that standard, it is apparent that the relevant field here is not petitioner’s straw men (Br. 15, 32) of all health or compensation issues arising from cigarette smoking. Rather, the language of the statute makes evident—and the legislative history canvassed by respondents confirms—that Congress was concerned with the health

aspects of (a) cigarette warnings and (b) the promotion or advertising of cigarettes. As to those matters, Congress unquestionably expected that its regulatory scheme—including the warnings it specifically drafted—would be exclusive, for “[t]here ‘can be no divided authority over interstate commerce . . . the acts of Congress on that subject are supreme and exclusive.’” *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 377 (1988) (citation omitted). See *Papas v. Upjohn Co.*, 926 F.2d 1019, 1025 (11th Cir. 1991), petition for cert. pending, No. 90-1837 (filed May 29, 1991).

Congress did not leave its purposes and objectives to speculation. It included a “declaration of policy and purpose” in the Labeling and Advertising Act (15 U.S.C. § 1331 (emphases added)), stating that it wanted to establish “a comprehensive Federal Program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health.” This program was to be the means “whereby” the public was to be “adequately” informed that smoking may be hazardous to health. The information was to be conveyed by a “warning” to that effect on each cigarette package. The terms, size, and placement of the warning were elaborately specified by Congress itself. “No” other health warning was allowed to be required, and “no” other requirement or prohibition based on smoking and health could be imposed by state law on the advertising and promotion of cigarettes. 15 U.S.C. § 1334 (emphasis added). The purpose of specifying the warning and eliminating all competing warning and advertising requirements was itself spelled out: to protect “commerce and the national economy” to the “maximum extent” consistent with Congress’s warning scheme and to prevent the impeding of commerce and the national economy by “diverse, nonuniform, and confusing” labeling and advertising regulations addressed to “any” relationship between smoking and health. 15 U.S.C. § 1331 (emphasis added).

In light of this declaration, it is inconceivable that Congress could have intended the states to exercise any au-



thority over the subject matter covered by the federal statute. Congress viewed regulation of the health aspects of cigarette warnings and advertising as a national problem demanding a "comprehensive" national solution. Indeed, petitioner effectively concedes this point. He acknowledges (Br. 27) that "Congress intended to occupy the narrow field of affirmative rulemaking with respect to health warnings on cigarette packages and in cigarette advertising."

Petitioner's asserted limitation to "affirmative rulemaking," however, is simply a retooling of his argument that the Labeling and Advertising Act preempts only statutory and regulatory "requirements" and not common law tort actions (see Pet. Br. 15 n.17). We have explained above that that distinction reflects a misunderstanding of general legal principles and a misreading of the Act. Without that unfounded qualification, petitioner's brief—inadvertently but tellingly—recognizes that Congress *has* occupied the particular field of health-related cigarette warnings and advertising. Because such an occupation of the field leaves no room for state law, petitioner's common law tort claims are preempted.

**B. Common Law Tort Claims Are Preempted Because They Would Conflict With Federal Law And Would Frustrate The Purposes And Objectives Of Congress In Enacting The Labeling And Advertising Act.**

The court of appeals held that the Labeling and Advertising Act impliedly preempts "state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes." 893 F.2d 541, 582 (3d Cir. 1990), quoting 789 F.2d 181, 187 (3d Cir. 1986), cert. denied, 479 U.S. 1043 (1987). The court explained that the imposition of state tort "liability for noncompliance with warning, advertisement, and promotion obligations other than those prescribed in the Act [would] have the effect of tipping the Act's balance of

purposes and therefore actually conflict with the Act." 789 F.2d at 187. This conclusion is plainly correct and is consistent with the ruling of every other federal appellate court to have considered the issue.<sup>10</sup>

Petitioner's attack on the Third Circuit's holding begins with the radical suggestion (Br. 14-15, 24) that if a court concludes that an express preemption provision is inapplicable in a particular case, it should not apply the doctrine of implied preemption but instead should automatically hold the state law permissible—regardless of any actual conflict between federal and state law. Contrary to petitioner's implicit premise, however, the fact that state law falls outside an express preemption provision does not necessarily mean that Congress affirmatively intended to allow such state action. All that can be said in those circumstances is that Congress did not foresee or consider the issue and thus did not provide for express preemption—thereby leaving it to the courts to decide, under the Supremacy Clause, whether state law is impliedly preempted because it conflicts with federal law or frustrates the purposes and objectives of Congress.

There is no plausible reason why Congress, by enacting an express preemption provision, would have wanted to create an immunity from implied preemption for conflicting state laws. Petitioner's approach would work a revolutionary change in the doctrine of preemption and cannot be squared either with this Court's settled formulation of preemption principles (see, e.g., *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-526 (1977)) or with the Court's decisions that have independently applied express and implied preemption.

In *Northwest Cent. Pipeline v. Kansas Corp. Comm'n*, 489 U.S. 493 (1989), for example, the Court considered

<sup>10</sup> See *Kotler v. American Tobacco Co.*, 926 F.2d 1217 (1st Cir. 1990), petition for cert. pending, No. 90-1473 (filed Mar. 19, 1991); *Pennington v. Vistron Corp.*, 876 F.2d 414 (5th Cir. 1989); *Roydon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230 (6th Cir. 1988); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987); *Palmer v. Liggett Group, Inc.*, *supra*.



the preemptive effect of the Natural Gas Act, which contained express preemption provisions assigning exclusive regulatory control over the interstate transportation and sale of natural gas to the federal government while reserving jurisdiction over the production and gathering of natural gas to the states. After finding that a state order was not expressly preempted, the Court went on to consider whether it was impliedly preempted, emphasizing that this was a necessary and appropriate inquiry notwithstanding the express statutory division of regulatory authority (*id.* at 515-516 n.12 (emphasis in original)):

[C]onflict-pre-emption analysis is to be applied, even though Congress assigned regulation of the production sphere to the States and Kansas has acted within its assigned sphere. \* \* \* Only by applying conflict pre-emption analysis can we be assured that both state and federal regulatory schemes may operate with some degree of harmony.

This sensible mode of analysis has been followed without question in other cases and forecloses petitioner's argument. See, *e.g.*, *Ingersoll-Rand*, 111 S. Ct. at 482, 484-485; *Jones*, 430 U.S. at 525, 540-541; *id.* at 544 (Rehnquist, J., concurring in part and dissenting in part); see also *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 591 (1987) (noting congressional intent not to preempt state law "except in cases of actual conflict"); cf. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 705 (1984) (finding both express and implied preemption under FCC regulations).

Once petitioner's diversion is put to one side, it is clear that state tort claims imposing warning requirements different from or in addition to the congressionally-mandated warning are impliedly preempted, because state law would stand as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. See *de la Cuesta*, 458 U.S. at 156. The Labeling and Advertising Act contemplates a single, succinct, uniform, national warning, so that the public would not be confused, and interstate commerce would

not be burdened, by diverse and nonuniform warnings imposed by the states. 15 U.S.C. § 1331. The Act's legislative history is replete with expressions of Congress's desire to avoid the chaotic conditions that would result if other authorities were permitted to impose their own health warning requirements. See, *e.g.*, S. Rep. No. 195, 89th Cong., 1st Sess. 4 (1965); H.R. Rep. No. 449, 89th Cong., 1st Sess. 4 (1965).

If a manufacturer were compelled by the threat of damages liability under state tort law to alter or supplement the warning on its cigarette packages, it would frustrate these goals and lead directly to the "diverse, nonuniform, and confusing" labeling that Congress sought to avoid.<sup>11</sup> Rather than the "short and direct" (S. Rep. No. 195, *supra*, at 4) cautionary statement that Congress felt to be most effective, consumers would be confronted with lengthy and legalistic warnings. Moreover, the warnings undoubtedly would vary from state to state, depending upon the requirements of local law. Perhaps unwittingly, the *amicus* brief of the former Surgeons General revealingly describes the many complex issues that are committed to the jury's discretionary determination in a common-law failure-to-warn case (Am. Br. 11-12 (emphasis added)):

If the warning is *accurate, clear and unambiguous*, if it is *sufficiently intense in language* to communicate the gravity of the risks involved in the use of the product, if it is *complete and unclouded* by contradictory messages, and as long as the methods chosen are *likely to find their way to those who need the warning*, the duty to warn is satisfied.

Under such an approach, differing jury outcomes—both within a state and among states—are certain to arise. The regime envisioned by petitioner would be completely

<sup>11</sup> Of course, to the extent that state law required manufacturers to put warnings on the cigarette package itself that were different from or in addition to that drafted by Congress, it would be impossible to comply with both state and federal law. See 15 U.S.C. § 1333; *Florida Lime*, 373 U.S. at 142-143.

unworkable and would bear no resemblance to the uniform regulatory scheme Congress intended.<sup>12</sup>

It is no answer to this inevitable inconsistency to suggest that a national manufacturer may obtain "uniformity" by complying with the most stringent state standard. To begin with, there is no reason why a single state should be allowed to assume the power to establish what is, as a practical matter, a nationwide rule; that is the responsibility of Congress, and one that it has specifically discharged in adopting the Labeling and Advertising Act. In any event, state standards in this area are not necessarily linear and cannot be ranked in order of stringency. For example, each of the 50 states could require a different "fact" to be disclosed or to be disclosed in a different manner; in that situation, compliance with no one state's law would satisfy the requirements of the other states, and compliance with all 50 rules would result in a jerry-built conglomeration that would confuse and overwhelm rather than inform consumers. Even worse, one state might require certain information that another state prohibits as misleading, unproven, or superfluous, thereby leaving cigarette manufacturers without any single warning label that can be used across the country. A greater departure from the congressional objective of uniformity can scarcely be conceived. See *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 165 (1978).

Petitioner offers little response to these concerns, other than to proclaim (Br. 41) that any conflict between federal and state law is merely potential or hypothetical. Contrary to petitioner's assertion, however, preemption is not limited to "circumstances in which federal and state laws are plainly contradictory" but also includes "those in which the incompatibility \* \* \* is discernible only

<sup>12</sup> Similar results would surely follow if states were permitted to regulate health-related claims in the advertising or promotion of cigarettes. Common law claims would result in an inconsistent patchwork of requirements and prohibitions that would be "diverse, nonuniform and confusing" and that would burden "commerce and the national economy" (15 U.S.C. § 1331(2)).

through inference." *Hayfield Northern R. Co. v. Chicago & N.W. Trans. Co.*, 467 U.S. 622, 627 (1984). See *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988). For the reasons already discussed, the conflict between the Labeling and Advertising Act and state tort law plainly is sufficient to establish, at the least, such "incompatibility."<sup>13</sup>

Petitioner also asserts (Br. 39) that state tort law is not impliedly preempted here because it has the same purpose as the Labeling and Advertising Act: the provision of information to consumers.<sup>14</sup> But Congress's objective was not to maximize at all costs the amount of information to be provided to consumers; rather, as the Act itself indicates (15 U.S.C. § 1331), Congress balanced that objective against the need for uniformity and the protection of commerce and the national economy. See *Palmer*, 825 F.2d at 623, 626. Of course, even if federal and state law had the same general purpose, state law would still be preempted because its means of achieving that end conflict with those chosen by Congress. See *Ouellette*, 479 U.S. at 494 ("[I]t is not enough to say that the ultimate goal of both federal and state law is to eliminate water pollution. A state law also is preempted if it interferes with the methods by which the federal statute was designed to reach this goal"); *Pacific*

<sup>13</sup> Several of the *amici* supporting petitioner seek to engage the Court in the continuing debate over smoking and health. See Am. Br. of American College of Chest Physicians, at 7, 22; Am. Br. of Former Surgeons General, *et al.*, at 5; Am. Br. of American Cancer Society, *et al.*, at 20; Am. Br. of American Medical Association, at 15, 18; see also Am. Br. of National League of Cities, *et al.*, at 19-20 n.12. These briefs make clear that their motivation for espousing common law tort claims is a policy disagreement with Congress as to the wisdom of its approach to the issue of smoking and health in general and the adequacy of the congressionally-drafted warning in particular. But what could be a more vivid illustration of frustration of congressional objectives than a common law judgment of liability that depends on a finding that the warning Congress expressly determined to be adequate is in fact inadequate?

<sup>14</sup> This argument, of course, is inconsistent with petitioner's earlier contention that state tort law is not regulatory in nature.



*Gas & Electric*, 461 U.S. at 216 n.28; *Perez v. Campbell*, 402 U.S. 637, 651-652 (1971). There can be no doubt that the method adopted by Congress to ensure that health information is provided to consumers—requiring that a short, direct and uniform nationwide warning be placed on each package of cigarettes, and requiring the FTC to police the fairness and accuracy of cigarette advertising—is in irreconcilable conflict with the regulatory regime of state tort law.

Finally, petitioner errs in asserting (Br. 43) that Congress recognized and accepted the conflict between the Act and state tort law. This case is a far cry from *Silkwood* and the other cases petitioner relies upon, in which there was affirmative evidence that Congress was aware of and approved the continued application of divergent state law. See pages 20-21, note 9, *supra*. Here, by contrast, every indication points to the opposite conclusion, including Congress's own role in drafting and later revising the warning label to ensure its adequacy. The mere fact that a few congressmen may have assumed that some tort suits against cigarette manufacturers would continue to be permissible certainly does not imply that Congress intended to allow tort suits such as this one, which can succeed only if a jury concludes that the federal warning and advertising scheme is inadequate.

### CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

KENNETH S. GELLER

*Counsel of Record*

MARK I. LEVY

*Mayer, Brown & Platt*

*2000 Pennsylvania Avenue, N.W.*

*Washington, D.C. 20006*

*(202) 463-2000*

*Counsel for Amicus Curiae*

JULY 1991

### APPENDIX

PLAC members include: American Home Products Corporation; American Telephone & Telegraph Company; Amoco Corporation; Amsted Industries, Inc.; Anheuser-Busch Companies, Inc.; Association of International Automobile Manufacturers, Inc.; The Boeing Company; Bridgestone/Firestone, Inc.; The Budd Company; Caterpillar, Inc.; Chrysler Corporation; Clark Material Handling Company; The Coca-Cola Company; The Coleman Company; Dana Corporation; Deere & Company; Defense Research Institute; Digital Equipment Corporation; Dow Chemical Company; Eaton Corporation; Exxon Corporation; FMC Corporation; Federal-Mogul Corporation; Ford Motor Company; Freightliner; The Gates Corporation; General Electric Company; General Motors Corporation; Goodyear Tire & Rubber Company; Gravely International, Inc.; Great Dane Trailers, Inc.; Harnischfeger Industries, Inc.; Hoechst Celanese; Honda North America, Inc.; Hyundai Motor America; Ingersoll-Rand Company; Isuzu Motors, America, Inc.; Johnson Controls, Inc.; Joy Technologies, Inc.; Kawasaki Motors Corp., U.S.A.; Eli Lilly and Company; Melroe Company; Mercedes-Benz of North America, Inc.; Merck & Company, Inc.; Michelin Tire Corporation; Miller Brewing Company; Minnesota Mining and Manufacturing Company; Mitsubishi Motor Sales of America; Monsanto Company; O.F. Mossberg & Sons, Inc.; Motor Vehicle Manufacturers Association of the United States, Inc.; Navistar International Transportation Corp.; New United Motor Manufacturing, Inc.; Nissan Motor Corporation, U.S.A.; Otis Elevator Company; PACCAR, Inc.; Philip Morris Companies, Inc.; Piper Aircraft Corporation; Pirelli Armstrong Tire Corporation; Playtex Family Products Corp., Inc.; Porsche Cars North America, Inc.; Procter & Gamble Company; RJR Nabisco, Inc.; Rockwell International; Schindler Elevator Corporation; Snap-on Tools Corporation; Squibb Corporation; Sturm, Ruger and Company; Subaru of America, Inc.;

(1a)



TRW, Inc.; Toyota Motors Sales, U.S.A., Inc.; U-Haul International; Union Carbide Corporation; Unocal Corporation; The Upjohn Company; U.S. Tobacco; USX Corporation; Volkswagen of America, Inc.; Volvo North America Corporation; Vulcan Materials; Jervis B. Webb Company; Whirlpool Corporation; and Yamaha Motor Corporation, U.S.A.

(17)  
No. 99-1028

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1991

THOMAS CIPOLLONE, individually, and as Executor of the  
Estate of Rose Cipollone,

*Petitioner,*

—v.—

LIGGETT GROUP, INC., a Delaware Corporation; PHILIP  
MORRIS INCORPORATED, a Virginia Corporation; and  
LOEW'S THEATERS, INC., a New York Corporation,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE THIRD CIRCUIT

**BRIEF AMICUS CURIAE OF THE  
ASSOCIATION OF NATIONAL ADVERTISERS, INC.,  
IN SUPPORT OF RESPONDENTS**

GILBERT H. WEIL  
60 East 42nd Street  
New York, New York 10165  
(212) 687-8573

BURT NEUBORNE\*  
40 Washington Sq. South  
New York, New York 10012  
(212) 998-6172

\* *Counsel of Record*

*Attorneys for Amicus Curiae*

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1991

No. 90-1038

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THOMAS CIPOLLONE, individually, and as Executor of the  
Estate of Rose Cipollone,  
*Petitioner,*

—v.—

LIGGETT GROUP, INC., a Delaware Corporation; PHILIP  
MORRIS INCORPORATED, a Virginia Corporation; and  
LOEW'S THEATERS, INC., a New York Corporation,  
*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE THIRD CIRCUIT

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**BRIEF *AMICUS CURIAE* OF THE  
ASSOCIATION OF NATIONAL ADVERTISERS,  
INC., IN SUPPORT OF RESPONDENTS**

---

**Interest of Amicus**

The Association of National Advertisers, Inc., (A.N.A.) respectfully submits this brief *amicus curiae* in support of respondents in this case. Letters of consent to the filing of this brief have been lodged with the clerk.

The Association of National Advertisers, Inc., the advertising industry's oldest trade association, is the only organization exclusively dedicated to enhancing the ability of



businesses to advertise both nationally and regionally. With more than 2,000 subsidiaries, divisions and operating units, A.N.A. members market a kaleidoscopic array of goods and services and account for almost 80% of annual national and regional advertising expenditures in the United States. As the nation's principal community of commercial speakers, A.N.A. has long been committed to the advancement of commercial speech designed to permit consumers to make informed and autonomous choices in the marketplace.

### Introductory Statement and Summary of Argument

As national advertisers, the members of A.N.A. are acutely aware of the costs and drawbacks of patchwork local regulation of the commercial speech process. When speakers seeking to communicate with a national audience are forced to comply with a series of overlapping and, often, conflicting state and local rules, two adverse speech consequences inevitably follow. First, the duty to comply with differing local speech regulations impedes effective communication by complicating and, often, precluding the use of uncluttered uniform messages and nationwide media that are the most effective means of mass communication. Second, the cost of local tailoring imposes a significant and wholly unnecessary economic burden on the commercial speech process.

Where, as in this case, Congress has elected to establish uniform national standards governing a significant category of commercial speech in order to avoid the drawbacks imposed by patchwork local regulation, A.N.A. believes that deference to Congress' will requires displacement of differing state and local rules of law.

When Congress legislates pursuant to its enumerated powers, it may, pursuant to Article VI, cl. 2, elect to displace state law that interferes with the full attainment of Congressional purpose. *Gibbons v. Ogden*, 9 Wheat. 1, 211 (1824) (Marshall, C.J.).

In deciding whether Congress has elected to displace state law, this Court looks, first, to the text of the federal statute. Where, as here, Congress has manifested an unmistakable textual intention to displace differing "requirement[s] and prohibition[s] . . . imposed under State law", this Court has given full scope to the Congressional text. Indeed, in *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), this Court held that language virtually identical to the language used by Congress in this case preempted differing state common law norms. See also *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).

Even where no Congressional text governing preemption exists, or where the words used by Congress to describe a statute's preemptive effect are ambiguous, this Court has consistently respected Congress' intent to displace state law when preemption is necessary to carry out Congress' intention to establish uniform national standards of behavior, especially in contexts involving the regulation of speech. In areas as diverse as regulation of aliens<sup>1</sup>, labor law<sup>2</sup>, commercial speech<sup>3</sup>, national security<sup>4</sup>, broadcast regulation<sup>5</sup>, and securities regulation<sup>6</sup>, this Court has repeatedly enforced Con-

1 *Hines v. Davidowitz*, 312 U.S. 52 (1941).

2 *Garner v. Teamsters Union*, 346 U.S. 485 (1953); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *Teamsters Union v. Morton*, 377 U.S. 252 (1964); *Machinists v. Wisconsin Employment Rel. Comm'n*, 427 U.S. 132 (1976).

3 *Franklin National Bank v. New York*, 347 U.S. 373 (1954); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

4 *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

5 *Farmers Union v. WDAY, Inc.*, 360 U.S. 525 (1959); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *City of New York v. F.C.C.*, 486 U.S. 57 (1988).

6 Compare *Edgar v. MITE Corp.*, 457 U.S. 624, 630-640 (1982) with *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 83 (1987).

gress' refusal to permit state and local rules to undermine the Congressional balance between freedom and regulation.

Finally, once Congress has manifested an intent to displace state law in order to achieve a uniform national standard governing particular speech or conduct, this Court has repeatedly refused to draw preemption distinctions between and among state statutes, state administrative regulations and state common law actions, recognizing that the continued existence of each impedes the uniform national standard of behavior desired by Congress. Eg. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) (preempting common law damage actions); *Teamsters Union v. Morton*, 377 U.S. 252 (1964); *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971); *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981); *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982); *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). See also *Erie R. Co v. Tompkins*, 304 U.S. 64 (1938); *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

In this case, Congress could not have been more explicit in its desire for uniform national standards governing the delivery of information by advertisers to consumers concerning the relationship between smoking and health. Congress mandated a uniform consumer health warning, explicitly displaced differing requirements and prohibitions imposed by state law and carefully retained the ongoing jurisdiction of the Federal Trade Commission over false and misleading tobacco advertising. State damage actions premised on differing state duties imposed on advertisers would destroy Congress' handiwork.

Finally, petitioner's pseudo-Solomonic invitation to distinguish between failure to warn claims and misrepresentation claims for the purposes of preemption would embark courts and juries on a wholly artificial and completely unpredictable semantic quest that would doom Congress' effort to forge uniform standards governing the area. Since Congress carefully preserved the ongoing jurisdiction of the Federal Trade

Commission over false and misleading tobacco advertising, no basis exists to invent a standardless exception to Congress' desire for uniform commercial speech rules in the area of smoking and health.

Accordingly, the decisions of the overwhelming majority of the courts below upholding preemption of the claims at issue on this appeal are correct.<sup>7</sup>

<sup>7</sup> Five federal appeals courts have found the claims raised in this appeal preempted. *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3rd Cir. 1986), followed, 893 F.2d 541 (3rd Cir. 1990); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987); *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987); *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230 (6th Cir. 1988); *Pennington v. Vistrion Corp.*, 876 F.2d 414 (5th Cir. 1989). Four state appellate courts have agreed with their federal counterparts. *Rogers v. R.J. Reynolds Tobacco Co.*, 557 N.E.2d 1045 (Ind. Ct. App. 1990); *Hite v. R.J. Reynolds Tobacco Co.*, 578 A.2d 417 (Pa. Super Ct. 1990); *Phillips v. R.J. Reynolds Industries, Inc.*, 769 S.W.2d 488 (Tenn. Ct. App. 1988); *McSorley v. Phillip Morris*, No. 536E (App. Div. N.Y. 1991). One state appellate court has found partial preemption. *Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655 (Minn. 1989). Two state appellate courts have declined to find preemption. *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 577 A.2d 1239 (1990); *Carlisle v. Phillip Morris, Inc.*, 805 S.W.2d 498 (Tx. Ct. App. 1991).



## ARGUMENT

### CONGRESS INTENDED TO ESTABLISH A UNIFORM NATIONAL RULE GOVERNING THE DELIVERY OF INFORMATION BY ADVERTISERS TO CONSUMERS CONCERNING THE RELATIONSHIP BETWEEN SMOKING AND HEALTH. ACCORDINGLY, STATE LAW, INCLUDING STATE COMMON LAW, THAT PURPORTS TO APPLY A DIFFERENT RULE IS PREEMPTED

#### 1. The Manifest Purpose of the Cigarette Labeling Act Was the Establishment of a Uniform National Standard Governing the Delivery of Information by Advertisers to Consumers Concerning the Relationship Between Smoking and Health

Congress made no secret of its purpose in enacting the Cigarette Labeling Act of 1965.<sup>8</sup> Spurred by the 1964 Report of the Surgeon General<sup>9</sup> and by the proliferation of uncoordinated local responses to the question of how best to convey

<sup>8</sup> Congress' Statement of Purpose provides:

It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

- (1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
- (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health. Pub. L. No. 89-92, 79 Stat. 282, reprinted in 1965 U.S. Code Cong. & Admin. News 300.

<sup>9</sup> *Smoking and Health, Report of the Advisory Committee to the Surgeon General of the Public Health Service*, U.S. Dept. of Health, Education and Welfare (Jan. 11, 1964).

adequate health information to consumers, Congress acted to establish a uniform national standard governing an advertiser's duty to inform consumers of the relationship between smoking and health by: (1) mandating a prescribed federal health warning on each package of cigarettes<sup>10</sup>; and (2) banning the patchwork of local prohibitions and requirements that threatened to Balkanize the communications process.<sup>11</sup>

Congress' aim in imposing a uniform nationwide standard governing the transmission by advertisers of information concerning the relationship between smoking and health was twofold. First, Congress recognized that the prime ingredients of effective mass communication are simplicity, uniformity and repetition. Congress understood that a single, uniform

<sup>10</sup> The warning initially read:

*Caution: Cigarette Smoking May Be Hazardous to Your Health.*

In 1970, the warning was amended to:

*Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health.*

See Pub. L. No. 89-92, 79 Stat. 282 and Pub. L. No. 91-222, 84 Stat. 87.

<sup>11</sup> The operative preemption provisions of the 1965 Act provide:

Section 5 (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.

(b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with this Act.

Pub. L. 89-92, 79 Stat. 282. In 1970, Section 5(b) was amended to read:

(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Pub. L. No. 91-222, 84 Stat. 87. The jurisdiction of the Federal Trade Commission over allegations of false or misleading cigarette advertising was specifically retained. *Id.*



health warning, uncluttered by local embellishments, was the most effective nationwide method of informing consumers of the Surgeon General's concerns.<sup>12</sup> Second, Congress recognized that the impracticability—indeed, impossibility—of attempting to market a product nationally while seeking to comply with a patchwork of differing local communication requirements and prohibitions would impose significant burdens on an industry that produced the nation's third leading agricultural export, its fifth largest cash crop and supported over 750,000 families.<sup>13</sup>

Accordingly, Congress imposed a uniform set of rules governing the commercial speech process that achieved effectiveness, practicality and economy through the mandatory repetition of an uncluttered uniform nationwide health warning to each consumer.

Whenever Congress has manifested a similar desire to impose uniform nationwide rules governing behavior, this Court has given full scope to Congress' decision to displace state standards that threaten to introduce variations into the uniform scheme.

For example, in the cases charting the preemptive effect of ERISA, culminating in *Ingersoll-Rand Co. v. McClendon*, \_\_\_ U.S. \_\_\_, 111 S.Ct. 478 (1990), this Court recognized that Congress wished to establish uniform, nationwide rules governing the administrative cost structure of ERISA pension plans in order to assure that employers would not reflect state cost variations by altering employee benefits. Accordingly, state rules of law, both statutes and common law claims, with the capacity to alter the administrative cost structure of an ERISA plan have been deemed preempted,

<sup>12</sup> Congress' Statement of Purpose, quoted *supra* at n. 8, noted the risk of "diverse, non-uniform, and confusing cigarette labeling and advertising regulations. . ." (emphasis added).

<sup>13</sup> 111 Cong. Rec. 13,950, 13,898 (1965) (Remarks of Sens. Ervin and Bass), cited in *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987) at 622, n.2.

even when they are explicitly designed to assist employees in enjoying the plans. Eg. *Ingersoll-Rand Co. v. McClendon*, *supra*; *FMC v. Holliday*, \_\_\_ U.S. \_\_\_, 111 S.Ct. 403 (1990); *Mackey v. Lanier Collection Agency & Service Inc.*, 486 U.S. 825 (1988).

Even in the absence of a strong textual preemption provision, such as the provision present in this statute and in ERISA, this Court has carefully preserved Congress' decision to establish uniform national standards governing particular economic activity by preempting state common law rules that threaten to introduce non-uniform legal duties. Thus, in *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), this Court recognized that Congress intended to establish uniform nationwide standards governing abandonment of rail lines by interstate carriers. Accordingly, the Court ruled that Congress had preempted Iowa's common law cause of action for damages for wrongful abandonment. See also *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971).

Moreover, this Court has repeatedly recognized that when, as here, Congress regulates in areas involving speech, the need for uniform nationwide rules reflecting Congress' view of the appropriate balance between freedom and regulation preempts state and local attempts to alter the Congressional balance. Indeed, Congress' desire to assure uniform national standards governing the regulation of speech has consistently been at the core of the Court's preemption cases. Eg. *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Garner v. Teamsters Union*, 346 U.S. 485 (1953); *Franklin National Bank v. New York*, 347 U.S. 373 (1954); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *Farmers Union v. WDAY, Inc.*, 360 U.S. 525 (1959); *Teamsters Union v. Morton*, 377 U.S. 252 (1964); *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971); *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *Michigan Canners & Freezers v. Agricultural Board*, 467 U.S. 461 (1984); *Capital Cities Cable, Inc. v. Crisp*, 467

U.S. 691 (1984); *City of New York v. F.C.C.*, 486 U.S. 57 (1988). See also *Edgar v. MITE Corporation*, 457 U.S. 624, 630-640 (1982).

For example, in the context of labor relations, in *Garner v. Teamsters Union*, 346 U.S. 485 (1953), this Court held that the National Labor Relations Act impliedly preempts state common law remedies for injunctive relief against peaceful recognition picketing. In *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), this Court held that state common law damage claims arising out of peaceful picketing activity were, likewise, impliedly preempted by the NLRA. In *Teamsters Union v. Morton*, 377 U.S. 252 (1964), the *Garner-Garmon* rule was applied to preempt state common law damage claims for secondary picketing activity. Finally, in *Machinists v. Wisconsin Employment Rel. Comm'n*, 427 U.S. 132 (1976), this Court ruled that state laws forbidding concerted refusals to work overtime were preempted, as well.<sup>14</sup>

In the context of broadcast regulation, this Court has also respected Congress' desire for uniform national standards when national communications are at issue. For example, in *Farmers Union v. WDAY, Inc.*, 360 U.S. 525 (1959), this Court ruled that state common law actions for libel against

<sup>14</sup> See also *Bus Employees v. Missouri*, 374 U.S. 74 (1963); *Michigan Canners & Freezers v. Agricultural Board*, 467 U.S. 461 (1984).

In *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966), the Court declined to wholly preempt claims for libel in the context of a labor dispute. Instead, the Court effected a partial preemption that displaced state libel law in private labor settings if it permitted recovery short of a showing of malice identical to the constitutional standard for political settings established in *New York Times v. Sullivan*, 376 U.S. 254 (1964). The net result of *Linn* was to establish highly protective uniform national legal standards governing libel in a labor context, but to rely on state courts to apply them. The Court followed the identical path in connection with suits for intentional infliction of emotional distress. *Farmer v. United Bro. of Carpenters & Joiners*, 430 U.S. 290 (1977).

broadcasters were preempted by the Federal Communications Act. Similarly, in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), this Court ruled that federal law preempted Oklahoma's attempt to ban liquor advertising from local cable television. Most recently, in *City of New York v. F.C.C.*, 486 U.S. 57 (1988), New York City's attempt to set technical standards for local cable television was held preempted by the Cable Broadcasting Act.

Perhaps the most dramatic examples of the role of preemption in assuring a uniform national standard in the area of speech and association have taken place in the national security area. In *Hines v. Davidowitz*, 312 U.S. 52 (1941), a Pennsylvania Alien Registration statute imposing significant restrictions on the civil liberties of aliens was held preempted by the Federal Alien Registration Act because the Pennsylvania statute altered the balance between freedom and regulation set by Congress. Similarly, in *Pennsylvania v. Nelson*, 350 U.S. 497 (1950), the Smith Act was held to preempt attempts by the states to prosecute for sediton against the United States.

Finally, in the commercial speech context at issue in this case, this Court has long respected Congress' intention to impose uniform national standards when it regulates commercial speakers. For example, in *Franklin National Bank v. New York*, 347 U.S. 373 (1954), this Court held that the federal statute authorizing national banks to accept savings deposits preempted New York's limitation on the use of the word "saving" or "savings" in bank advertising. Similarly, in *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), this Court ruled that federal weight labeling rules preempted California's attempt to impose more stringent weight labeling standards, precisely because differing state rules would interfere with a uniform national communication system. A similar commitment to uniform national standards governing speech doomed Oklahoma's attempt to regulate liquor advertising on local cable television in *Capital Cities Cable, Inc. v. Crisp*, *supra*.



Thus, when Congress acted to impose a uniform set of national standards governing commercial speech about the relationship between smoking and health, it acted against a backdrop of consistent recognition by this Court that Congressional establishment of national communications standards preempts differing state and local rules of law.

## 2. State Common Law Damage Actions That Conflict With the Cigarette Labeling Act Are Preempted

Petitioner argues that common law damage actions are not preempted: (1) because they fall outside the literal words of Congress' preemption clause; and (2) because damage actions would not undermine Congress' desire for uniform communications rules. Petitioner's attempt to carve out a unique preemption status for common law damage actions fails on both grounds.

The express language of the preemption clause in the Cigarette Labeling Act talks in terms of "requirement[s] or prohibition[s] . . . imposed under State law". Common law damage awards, argues petitioner, are not "requirements" or "prohibitions" at all; but merely the economic costs of a given course of unlawful conduct, leaving a defendant free to continue its lawless conduct subject to the risk of continuing future damage awards.

Such a myopic view ignores the fact that a common law damage recovery must be based on the violation of a common law duty that imposes legally enforceable "requirements" or "prohibitions" on a defendant. It is, of course, precisely the existence of such differing state and federal legal duties affecting the commercial speech process that Congress intended to preempt.

Not surprisingly, when Congress has used the phrases "state law" or "requirements" to define the preemptive reach of a federal statute, this Court has recognized that inconsistent state statutory and common law norms are equally displaced. For example, in preemption cases arising under ERISA, this Court has recognized that common law

damage actions fall within the phrase "state law" used by Congress to define the scope of preemption. *Ingersoll-Rand Co. v. McClendon*, \_\_\_\_ U.S. \_\_\_\_, 111 S.Ct. 478 (1990).<sup>15</sup>

Even more dramatically, in *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), a federal banking regulation explicitly displaced "state law which imposes different . . . requirements" 41 Fed. Reg. 18286, 18287 (1976). (emphasis added). Faced with preemption language that is literally identical to the language used by Congress in this case, this Court held in *de la Cuesta* that differing state common law rules were fully preempted.

The recognition in *de la Cuesta* that the phrase "requirements" "imposed" by "state law" preempts both statutory and common law norms reflects a realization that Congress' desire to establish uniform standards of conduct in a given area would be frustrated by any conflicting State rule—common law or statutory—having the force of law. Thus, this Court has repeatedly preempted state common law damage actions on the same terms and conditions as state statutes. Eg. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *Teamsters v. Morton*, 377 U.S. 252 (1964); *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971); *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981); *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982); *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). See *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) (equating state common law and state statutory law).<sup>16</sup>

<sup>15</sup> In ERISA, Congress explicitly defined "state law" to include "laws, decisions, rules, regulations or other state action having the effect of law". In the Cigarette Labeling Act, Congress also used the phrase "state law" in the preemption clause, but, unlike ERISA, did not add a definitional section. No basis exists to suggest that Congress intended "state law" to mean radically different things in the two statutes, or that Congress believed its use of "state law" in ERISA was aberrational.

<sup>16</sup> As Justice Harlan noted in *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971) and *Hanna v. Plumer*, 380 U.S. 460,



The two principal cases cited by petitioner to support a distinction between statutory rules and common law damage actions for the purposes of preemption in fact illustrate Congress' reluctance to draw such distinctions among categories of legal rule.

In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), the Court held that Congress' decision in the Price-Anderson Act to authorize state compensatory damage claims arising out of the operation of nuclear facilities implied a willingness to permit the entire panoply of state tort remedies, including punitive damages. Similarly, in *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988), Congress' decision to permit state substantive tort law to govern claims arising out of the operation of a federal nuclear facility, coupled with Congress' explicit decision to submit the facility to state workmen's compensation law, implied a willingness to permit the full scope of Ohio's Workmen's Compensation Law to operate, including enhanced damages for ignoring state safety regulations.

Thus, unlike this case, both *Silkwood* and *Goodyear Atomic* involve settings where Congress explicitly decided to permit non-uniform state laws to govern the operation of federally-regulated facilities. Having made that fundamental judgment, Congress then permitted the full range of state law remedial mechanisms to operate. In this case, having decided

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474 (1965) (Harlan, J. concurring), *Erie* and preemption are two sides of the same coin. Cases under *Erie* ask whether the existence of differing rules of common law governing diversity cases in federal courts interfere with the constitutional authority of the states to regulate primary behavior. If so, the federal norms are displaced.

Preemption cases ask whether the existence of differing state and federal rules of law interfere with the constitutional authority of Congress to regulate pursuant to its enumerated powers. If so, the state norms are displaced.

Since the historic ruling in *Erie*, the Court has consistently—and correctly—refused to distinguish between common law and statutory rules in either setting, recognizing that both judge-made and statutory law operate to regulate behavior.

to displace non-uniform state norms in favor of a uniform national rule, Congress would hardly be likely to sabotage its handiwork by drawing precisely the type of arbitrary distinctions between statutory and common law rules that it rejected in *Silkwood* and *Goodyear Atomic*.

Petitioner's insistence that common law damage actions do not pose a threat to Congress' desire for uniform standards of behavior ignores the role of the common law in shaping "primary" behavior.<sup>17</sup> While compensation is, of course, a significant function of the common law of torts, tort law is designed, as well, to shape the future behavior of persons subject to its strictures. Petitioner's suggestion that compensatory damage recoveries do not exert a "regulatory" pressure on potential defendants to alter their behavior ignores reality and denigrates the normative value of law.

Viewed solely as a matter of enlightened self-interest, potential tort defendants will, of course, alter their behavior to avoid future liability. Moreover, even if, in purely economic terms, a potential defendant were tempted to follow petitioner's advice and ignore a state common law duty, he would risk massive punitive damage liability, a virtually certain injunction and the risk of criminal sanctions. *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Pacific Mutual Life Ins. Co. v. Haslip*, \_\_\_ U.S. \_\_\_, 111 S.Ct. 1032 (1991). See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). As Judge Brown put it in *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 627 (1st Cir. 1987), a tort defendant saddled with a compensatory damage verdict is as free to continue his unlawful conduct as is a drowning man to refuse to come up for air.

Finally, petitioner's casual view of the obligations imposed by common law duties ignores the normative value of law. Law in our society is more than a cost/benefit exercise that

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17 The terms "primary" and "secondary" behavior, as well as the terms "pre-" and "post-event behavior" are drawn from Justice Harlan's celebrated concurrence in *Hanna v. Plumer*, 380 U.S. 360, 374 (1965).

invites persons to opt out of its strictures upon payment of a fine. Law imposes a duty to obey, not merely because a "bad man" fears the consequences of non-compliance, but because life in a complex society imposes a moral—and powerfully compelling—duty to obey the law. When the law speaks—common or not—people should listen, not merely because they are afraid of formal sanction, but because voluntary compliance is morally expected of them in a civilized society.

### 3. Preempting the State Law Claims Involved in this Appeal Would Neither Create a Regulatory Void, Nor, Under Petitioner's View of the Case, Deprive Injured Persons of a Tort Remedy

Petitioner argues that Congress could not have intended to preempt state common law damage claims premised on advertising or promotion because preemption would create a regulatory void that would amount to a "license to lie" about the health risks associated with smoking.

Putting aside the fact that the federally mandated health warnings were explicitly deemed by Congress to provide adequate warnings to consumers, petitioner's argument completely overlooks the fact that Congress carefully retained the jurisdiction of the Federal Trade Commission over false and misleading claims by tobacco advertisers.<sup>18</sup> Having established uniform national rules governing the communication of information by advertisers to consumers concerning the relationship between smoking and health, Congress explicitly empowered the Federal Trade Commission to continue to police the accuracy of tobacco advertising, including the power to require warnings on advertisements as well as packages.<sup>19</sup> Indeed, it was the efforts of the F.T.C. that persuaded the industry to agree in 1972 to display health warnings on all cigarette advertisements, in addition to displaying a health warning on each package of cigarettes.<sup>20</sup>

18 See 15 U.S.C. § 45; 15 U.S.C. 1336(b).

19 15 U.S.C. 1336(a).

20 See *In re Lorillard*, 80 F.T.C. 455 (1972).

Moreover, the existence of F.T.C. jurisdiction over false and misleading cigarette advertising is a complete answer to petitioner's attempt to drive a standardless semantic wedge between "misfeasance" and "non-feasance" involving communications concerning the relationship between smoking and health. Even without the F.T.C.'s regulatory authority, it would have proven impossible to distinguish, for preemption purposes, between so-called failure to warn claims and so-called affirmative misrepresentation claims. The very uncertainty of the utterly arbitrary line between "failing to warn adequately" and "misrepresenting" would have doomed Congress' desire for uniform speech rules in the area. Simply stated, no two states—indeed, no two juries within the same state—would have drawn the line in the same place, inevitably leading to precisely the patchwork of local speech rules that Congress sought to prevent.

Fortunately, the F.T.C.'s conceded power over false and misleading advertisements obviates the need to strain to avert an alleged regulatory void by resorting to semantics about whether a given advertisement fails to warn adequately or affirmatively misrepresents the relationship between smoking and health. The F.T.C. has full authority to deal effectively with both categories of claims without having to engage in the impossible task of parsing verbal non-feasance from verbal misfeasance.

The technique of displacing state common law damage remedies, while vesting continuing supervisory authority in a federal administrative agency, is commonly utilized by Congress, especially in settings governing the regulation of speech and association. For example, in the labor law context, state damage claims for lawful peaceful picketing, as well as secondary picketing<sup>21</sup>, have been preempted, with continuing supervisory authority over the activity vested in the National

21 For the standards governing secondary picketing, see *N.L.R.B. v. Retail Store Employees*, 447 U.S. 607 (1980); *N.L.R.B. v. Fruit Packers*, 377 U.S. 58 (1964). Secondary picketing is distinguished from secondary leafleting in *DeBartolo Corp. v. Fla. Gulf Coast Trades Council*, 485 U.S. 568 (1988).



Labor Relations Board. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *Teamsters Union v. Morton*, 377 U.S. 252 (1964). Similarly, in the broadcast area, state common law libel actions against broadcasters were preempted, with continuing supervisory authority in the Federal Communications Commission. *Farmers Union v. WDAY, Inc.*, 360 U.S. 525 (1959). Finally, in the commercial speech context, state rules governing the disclosure of accurate product weights were preempted, with continuing supervisory authority in the Federal Trade Commission. *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). See also *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) (federal policy of disclosure preempts state policy of prohibition).

Thus, rather than resulting in a regulatory void, preemption of health-related claims premised on cigarette advertising and promotion would carry out a carefully calibrated regulatory program pursuant to which Congress imposed uniform, economical and effective commercial speech rules by: (1) mandating uniform national consumer health warnings; (2) expressly displacing differing state regulations and prohibitions and (3) vesting ongoing supervisory authority over tobacco advertising in the Federal Trade Commission.

Finally, petitioner argues that Congress could not have intended to strip injured persons of all tort remedies for damages to health caused by smoking. The short answer to petitioner is that petitioner himself has argued in the lower courts that preemption of the claims raised in this appeal does nothing of the kind. Petitioner has vigorously argued below that the preemption aspects of the Cigarette Labeling Act are confined to claims arising out of the advertising and promotion of cigarettes. Accordingly, petitioner has consistently argued that no preemption occurs with respect to design defect claims; no preemption occurs with respect to pre-1965 Act claims, including the post-1965 consequences of pre-1966 tobacco use; and, most importantly, no preemption occurs with respect to strict liability claims that impose so-called risk/utility damages on a manufacturer without regard to the adequacy of any warning.

Petitioner's view of the limited preemptive nature of the Cigarette Labeling Act is, of course, not before the Court in this appeal, which deals solely with the Act's preemptive effect on claims arising out of advertising and promotion. However, petitioner can hardly argue that preemption of claims arising out of advertising and promotion would deprive him of any tort remedy, while at the same time asserting in the lower courts that, regardless of the outcome of this appeal, significant tort remedies remain available to him.

Congress, in enacting the Cigarette Labeling Act, sought to assure that consumers were informed of the health risks associated with smoking without imposing undue burdens on the tobacco industry. State common law damage actions based on advertising or promotion would doom the Congressional plan. A patchwork of differing state common law duties would inevitably erode the use of a simple uniform national warning message and would significantly—and needlessly—increase the cost of compliance. Accordingly, the Third Circuit's opinion should be affirmed, freeing the trial court to continue with petitioner's remaining claims for relief.



**Conclusion**

For the reasons stated above, the decision of the court below should be affirmed.

Dated: New York, New York  
July 10, 1991

Respectfully submitted,

Burt Neuborne  
(Counsel of Record)

40 Washington Square South  
New York, New York 10012  
(212) 998-6172

Gilbert H. Weil  
60 East 42nd Street  
New York, New York 10165  
(212) 687-8573

*Attorneys for A.N.A.*

**AMICUS CURIAE**

**BRIEF**

18

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1991

THOMAS CIPOLLONE,

*Petitioner,*

v.

LIGGETT GROUP, INC., *et al.*,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE THIRD CIRCUIT

**BRIEF OF THE NATIONAL ASSOCIATION  
OF MANUFACTURERS AS AMICUS  
CURIAE IN SUPPORT OF RESPONDENTS**

**Of Counsel:**

Jan S. Amundson

*General Counsel*

Quentin Riegel

*Deputy General Counsel*

National Association of

Manufacturers

1331 Pennsylvania Avenue, N.W.

Suite 1500 — North Lobby

Washington, D.C. 20004-1703

(202) 637-3058

Diane L. Zimmerman

*Counsel of Record*

Gary E. Crawford

SKADDEN, ARPS, SLATE,

MEAGHER & FLOM

919 Third Avenue

New York, New York 10022

(212) 735-3000

*Counsel for Amicus Curiae*

*Date: July 10, 1991*



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No. 90-1038

## IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THOMAS CIPOLLONE,

*Petitioner,*

v.

LIGGETT GROUP, INC., *et al.*,

*Respondents.*

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

## BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

### INTEREST OF THE AMICUS CURIAE

The National Association of Manufacturers of the United States of America ("NAM") is a voluntary business association of approximately 12,500 companies and subsidiaries, employing eighty-five percent of all manufacturing workers and producing over eighty percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council. NAM and these councils are vitally interested in a balanced and proper interpretation of the scope of preemption language in federal statutes. Letters of consent from the parties permitting the filing of this brief have been filed with the Clerk of the Court.

## SUMMARY OF THE ARGUMENT

The Third Circuit correctly held that the Federal Cigarette Labeling and Advertising Act ("Cigarette Act"), 15 U.S.C. §§ 1331 *et seq.*, preempts common law duty to warn claims,<sup>1</sup> but it erred in finding preemption merely to be implied. The express preemption provision of the Act unambiguously removes all state authority to require that statements relating to smoking and health, other than those prescribed by Congress, appear on cigarette packaging. Because state common law tort actions have a clear regulatory effect on the conduct of manufacturers with regard to warnings, such actions fall squarely within the scope of the express preemption provision of the Cigarette Act.

Even if this Court were not to find express preemption, it should affirm the Third Circuit on the ground that preemption is implied. A direct, actual conflict exists between the federal purpose underlying the Act and the effect of state tort actions for failure to warn. Congress intended the uniform warnings required by the Act to facilitate interstate commerce and protect against diverse warnings. Common law actions in state courts would inevitably impose a hodgepodge of additional warning requirements. If manufacturers attempt, as they must, to respond by changing their warning labels, or by disseminating additional information through other means, Congress' stated goal of ensuring nonconfusing and nationally uniform warnings would be defeated.

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<sup>1</sup> The interest of *amicus* in this case largely concerns the mistaken views on the law of preemption that have been adopted by the Petitioner and his *amici* and the courts in *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 577 A.2d 1239 (1990) and *Carlisle v. Philip Morris, Inc.*, 805 S.W.2d 498 (Tex. Ct. App. 1991). We believe that the error of these views can be demonstrated through analysis of the Cigarette Act's preemptive effect on failure to warn claims. There is, therefore, no need to discuss separately the issues concerning preemption of claims based upon the propriety of Respondents' advertising. We note, however, our full agreement with Respondents' interpretation of the Cigarette Act with regard to the preemption of such claims. By clearly providing that no requirements or prohibitions relating to smoking and health may be imposed by the states with respect to the labeling, advertising, or promotion of cigarettes, the statute preempts not merely actions for the things that cigarette manufacturers have not said about smoking and health (i.e., claims alleging failure to warn) but also suits for what they have communicated (e.g., claims alleging misrepresentation).

Finally, this Court should reject Petitioner's invitation to adopt a broad and inflexible rule that preemption cannot occur unless either Congress expresses its intent "with drastic clarity" or there is no sense, however farfetched, in which state and federal law can co-exist. Such a rigid approach would require the Court to abandon its long-established and highly appropriate practice of deciding preemption questions by fact-specific inquiries into the purpose, structure, and language of particular pieces of legislation and particular conflicts between state and federal law.

## ARGUMENT

### I. CONGRESS HAS PREEMPTED STATE COMMON LAW CLAIMS RELATING TO HEALTH WARNINGS

#### A. The Cigarette Act Expressly Preempts Any State Action That Results In A Warning Requirement Relating To Smoking And Health.

The Third Circuit correctly found that the Cigarette Act preempts state tort actions for failure to warn. The *amicus* differs with the Third Circuit on this point in only one respect: we believe, in contrast to the court below, that the statute should be found to preempt such actions expressly. This does not mean that the courts that have found implied preemption were incorrect in discerning an actual conflict between state tort actions based on the alleged inadequacy of the health information provided by the cigarette manufacturers and the federal purposes underlying the Cigarette Act—but merely that tort requirements with respect to warnings also fall within the scope of the express preemption provision. We urge this Court to find that Congress expressed its expectation directly in the language it chose for the preemption clause: a tort remedy *is* preempted because it is a form of prohibited requirement.

The court below confused the analysis of this question because it assumed that Congress, if it wished to preempt state tort remedies directly, would have done so using specific rather than general terms—that is, by actually specifying that states could not use tort



actions as a method of frustrating the purpose of the Act. But the express preemption in this statute was accomplished in a different way. Congress, rather, chose to address preemption comprehensively, prohibiting other warning requirements relating to smoking and health regardless of how or by whom such requirements might be imposed. 15 U.S.C. § 1334(a).<sup>2</sup> Because Congress made absolutely clear that it wished to preempt state-imposed warning requirements, the only question this Court must decide, to determine this aspect of the case, is whether tort remedies based on failure to warn are a form of requirement. If they are, and we argue that this point is incontrovertible, then it is respectfully submitted that the Court must find express preemption in this case.

A presumption against preemption was used by the court below as a reason to demand specific language addressing tort remedies in order to find express preemption. This reasoning was incorrect. The presumption against preemption supports the interests of federalism by providing a rule of decision for cases where it is a close question whether or not Congress intended to displace state authority. It is not an arbitrary stricture meant to disfavor particular *means* for evincing that intent. The lower court's approach imposes on Congress an unjustifiably rigid standard for the drafting of statutes. If that analysis is upheld, Congress will be able to achieve express preemption in only one way—by spelling out in great detail every specific act that is prohibited—whereas it can impliedly preempt exactly the same activity simply by the general way in which an act is structured. Such a rule erects unjustified and artificial barriers to permitting the express intent of Congress to be credited by the courts. It should be rejected.<sup>3</sup>

<sup>2</sup> The text of this section is set out in the Statutory Appendix (Stat. App.) at A-1.

<sup>3</sup> By contrast, a very different treatment has been accorded similar language in another statute. The Medical Device Amendments of 1976, 21 U.S.C. §§ 360c *et seq.*, contain a preemption provision worded much like that in the Cigarette Act. See 21 U.S.C. § 360k(a) (text set out in Stat. App. at A-1). The preemptive effect of this statute has been widely tested in the courts below, largely in cases of toxic shock attributed to tampon use. The Act has almost always been held to preempt tort actions for failure to warn, and in several instances, the courts have found that intent to have been directly expressed by Congress in § 360k(a). See, e.g., *Moore v. Kimberly-Clark Corp.*, 867 F.2d 243, 247 (5th Cir. 1989); *Rinehart v. Inter-*

While it is true that, in certain circumstances, Congress has used both preemption and savings clauses that identify specific actors or types of actions,<sup>4</sup> there is certainly no rule that Congress can only draft statutes in one way. Congress is entirely free to adopt any form of words it chooses to accomplish its purposes, including drafting a preemption provision, as it has here, that identifies a *result*, rather than a specific form of action, it wishes to prevent.

The advantage of identifying the desired result is obvious: it allows Congress to achieve its objective without having to predict in advance every possible circumstance under which an exercise of state authority could defeat or distort its aims. That this was the path Congress took in the Cigarette Act has been implicitly acknowledged by the courts below. It is quite evident that the very presence of the broadly couched preemption clause here at issue is a major reason preemption of state tort actions by the Cigarette Act has been so widely recognized by both state and federal courts. See, e.g., *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 186 (3d Cir. 1986) (broad language of preemption clause one piece of evidence relied upon to find implied preemption), *cert. denied*, 479 U.S. 1043 (1987).

A reason why it is advantageous to allow Congress to target a result rather than specific means is that Congress cannot always predict how the law will develop. This fact is demonstrated by the historical context of the Act. The Cigarette Act was first passed at a time of great ferment. State and local authorities as well as federal administrative agencies had been galvanized by the 1964 Surgeon General's Report on Smoking and Health into looking for ways to

*national Playtex, Inc.*, 688 F. Supp. 475, 477 (S.D. Ind. 1988); *Stewart v. International Playtex, Inc.*, 672 F. Supp. 907, 909 (D.S.C. 1987); *Berger v. Personal Prods., Inc.*, 115 Wash. 2d 267, 275, 797 P.2d 1148, 1152 (1990), *cert. denied*, 111 S. Ct. 1584 (1991). Nothing in the opinions reveals a reason to find express preemption in this language and not to find it in the similar "requirement" language of the Cigarette Act.

<sup>4</sup> For example, the Consumer Product Safety Act of 1972 requires nationwide compliance with federal safety standards but specifies that such compliance is not a defense to liability under state statutory or common law. 15 U.S.C. § 2074. Similarly, Congress included a savings provision for tort liability arising under either state statutes or common law in the Comprehensive Smokeless Tobacco Health Education Act of 1986. 15 U.S.C. § 4406(c). See pp.13–15, *infra*.

regulate the tobacco industry and educate consumers on the risks of smoking. See H.R. REP. NO. 449, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Admin. News 2350, 2351-53. State tort law was also in a period of change. The first important decision applying the doctrine of strict tort liability to a personal injury action arising from a defective product had been handed down only two years before. *Greenman v. Yuba Power Prods., Inc.*, 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). Section 402A of the Restatement (Second) of Torts, a strict liability formulation subsequently adopted by most states for analyzing product liability claims, was working its way through the process of adoption by the American Law Institute in the period immediately preceding the passage in 1965 of the original version of the Cigarette Act.

In the face of so much and such varied activity, it is little wonder that Congress did not feel compelled (or perhaps able) either in 1965, when it wrote the preemption provision, or in 1969, when it amended it, to predict every specific sort of activity that conflicts with its objectives.<sup>5</sup> Nor should it be required to do so. Rather it chose to speak in terms of preempting state requirements. With respect to tort judgments based on failure to warn, the relevant ques-

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<sup>5</sup> Petitioner cites to certain colloquies that occurred during consideration of the 1965 Cigarette Act and the 1969 amendments to support his claim that Congress did not intend tort actions to be within the reach of the preemption provision. See Brief for Petitioner at 33-36, nn. 41, 42. The most that can be said for these bits of debate is that they suggest that some members of Congress believed that at least some tort claims for personal injury would survive the passage of the Act. A decision by this Court to affirm *Cipollone*, which finds preemption as to some but not all of Petitioner's claims, would in no way be inconsistent with that understanding. The discussions do not suggest that those members of Congress had thought very deeply about the possible impacts of tort law on its legislative scheme, but they certainly do not evince a willingness to have the objective of a uniform national system of warnings undercut by diverse judge- or jury-made rules. Because legislative history must be used cautiously, see *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 26 (1977), and because colloquies like these are among the least reliable forms of legislative history, see *Garcia v. United States*, 469 U.S. 70, 76 (1984); *United States v. O'Brien*, 391 U.S. 367, 385 (1968), this Court should not give undue weight to these passages as evidence which contradicts the express language, purpose and structure of the Act. The text itself provides the clearest, most reliable evidence of what Congress intended to achieve.

tion, therefore, is simply whether such judgments are a form of requirement. If so, then they have been expressly preempted.

### **1. State Tort Remedies Based On Failure To Warn Have A Regulatory Effect And Are, Therefore, A Form Of Prohibited Requirement.**

Petitioner and his *amici* say that there is no express preemption under the Cigarette Act because tort judgments are not a form of requirement. Their argument is naive, and ultimately self-contradictory. They attempt to downplay the regulatory nature of tort verdicts for failure to warn by claiming that tort actions primarily compensate victims and affect the future behavior of defendants at most indirectly, and often not at all. They suggest that a verdict in favor of a plaintiff cannot be a requirement because such a verdict lacks the compulsory effect of a state statute or regulation. The defendant, according to this argument, can decide not to change its behavior but can instead simply opt to pay. This argument is wrongheaded for many reasons,<sup>6</sup> but in particular because it ignores altogether the peculiar nature of failure to warn claims involving mass-produced products.

Although some might argue that tort actions for ordinary negligent injury are primarily compensatory and only incidentally regulatory, the same could not be said for failure to warn claims in product cases. A traffic accident may occur in hundreds of ways, and—fortunately for all of us—it will be a rare driver who causes

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<sup>6</sup> The argument that tort judgments do not regulate because the defendant has a choice simply to pay money is no more convincing than the same argument would be if applied to a criminal fine. In those cases, too, the defendant need not change his behavior, but can simply pay. That fact alone does not mean that criminal law is not regulatory. Nor can it be argued that criminal fines are different because, if the wrongdoer persists in his misconduct, the penalty will be increased. The same is true in the tort system. A manufacturer who pays a failure-to-warn judgment without modifying its subsequent behavior exposes itself to punitive damages in later cases; a refusal to change its behavior becomes evidence of willful and wanton misconduct or reckless disregard of safety that justifies exemplary damages. See, e.g., *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 47 (Alaska 1979) (punitive damages a way to insure that manufacturer cannot opt merely to pay), *modified*, 615 P.2d 621 (1980), *cert. denied*, 454 U.S. 894 (1981). This fact is conveniently ignored by Petitioner and his *amici* in making their argument that tort remedies are not compulsory.



them repeatedly and each time in precisely the same fashion. Thus, a successful suit against a careless driver will be quite fact-specific, and although it will hopefully encourage that person to take greater care in the future, it could be argued that the primary function of the verdict is to provide a particular victim with compensation.

In contrast to the defendant whose momentary carelessness causes an isolated accident, a product manufacturer or distributor who breaches its duty to warn exposes every consumer of the product to a similar potential risk; the manufacturer's course of conduct that leads to Consumer A's injury is indistinguishable from that which injures Consumers B and C. At least as important as the compensation of the victim, therefore, is the impetus provided by the threat of repeated damage awards against a manufacturer or a seller of consumer goods with the capacity to inflict similar harm on numerous users.

An even more extreme manifestation of the regulatory objective of products liability litigation is found in the availability of punitive damages for failure to warn. *See, e.g., Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 399-407 (5th Cir.), *cert. denied*, 478 U.S. 1022 (1986) (punitive damages available for failure to warn); *Tetuan v. A.H. Robins Co.*, 241 Kan. 441, 738 P.2d 1210 (1987) (same); *Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984) (same). Awards of punitive damages are well recognized to be for the purpose of "teaching the defendant not to do it again, and of deterring others from following the defendant's example." W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, *PROSSER AND KEETON ON TORTS* 9 (5th ed. 1984).

This reality clearly explains the argument against preemption made in the *amicus* brief submitted on behalf of twelve states, which contradicts Petitioner's claim that tort damage judgments do not regulate. These states urge that *Cipollone* be reversed precisely because products liability tort actions in fact *do* regulate. They argue that the states should be permitted to retain authority to promulgate tort rules in this area because such rules act as a prophylactic against future harm. As the states recognize, tort actions

[encourage] manufacturers to produce a safer product and design better consumer warnings regarding the dangers of cigarette smoking . . . . Thus, state common law is an additional tool, complementary to statutory enactments, to minimize the harmful health effects of cigarette smoking on their citizens.

Brief *Amici Curiae* of the State of Minnesota, *et al.*, in Support of Petitioner at 6.

We believe that the states are clearly correct in their evaluation of the effect of tort rules. Where we part company with them, however, is on the conclusion they draw from their observation. In their brief, the states express a desire for authority to regulate in the area of warnings through operation of their tort rules. This is just the authority that Congress has denied them. The fact that the states disagree with this decision does not change the fact that Congress was entitled to make it, and did.

That tort actions can have the effect of a regulatory requirement has been well-recognized by this Court, a fact which could not have been entirely beyond the ken of Congress when it drafted the earliest version of the Act in 1965. Six years before, in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), this Court had found state tort actions to be a preempted form of regulation. The opinion stated clearly that "[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy". *Id.* at 247. And in 1964 in the landmark defamation case, *New York Times Co. v. Sullivan*, this Court observed that, "The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute." 376 U.S. 254, 277 (1964).

Later decisions have also acknowledged that common law rules can regulate in ways that conflict with federal statutes and regulations. *See, e.g., International Paper Co. v. Ouellette*, 479 U.S. 481, 494-95 (1987) (state common law nuisance actions are a form of conflicting regulation and preempted to the extent that they contravene the federal water pollution control scheme); *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S.



311, 323-27 (1981) (state actions for common law negligence and interference with contractual relations a form of regulation preempted by the Interstate Commerce Act).

Although the decision in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), is heavily relied upon by the Petitioner, as well as by the District Court in the first *Cipollone* ruling, to support a finding that common law remedies are not preempted by the Cigarette Act, *Silkwood* does not in any sense stand for the proposition that a requirement imposed by common law is not a "real" requirement for preemption purposes. In fact, this Court specifically acknowledged in *Silkwood* that liability for damages is a form of regulation. *Id.* at 256.

## **2. Congress Followed The Cigarette Act Model In Drafting A Later Preemption Provision And Did So With Full Knowledge Of The Preemptive Effect Given That Language By The Federal Circuits.**

An additional source of insight into the meaning of the Cigarette Act's preemption clause can be gained by an examination of what Congress did in drafting subsequent legislation. As this Court has acknowledged elsewhere, other legislation containing similar provisions can sometimes shed light on Congress' intent with regard to preemption. *See, e.g., Ingersoll-Rand Co. v. McLendon*, 111 S. Ct. 478, 485-86 (1990) (finding parallels between ERISA and the Labor Management Relations Act with regard to preemption). In this case, two statutes, both involving warnings and both passed at a time when Congress was clearly aware that courts were beginning to examine whether tort actions were preempted by a variety of federal statutory schemes, provide support for the argument that the preemption clause in the Cigarette Act covers tort actions rooted in failure to warn. Those statutes are the Alcoholic Beverage Labeling Act of 1988 ("Alcohol Act"), 27 U.S.C. §§ 213 *et seq.*, and the Comprehensive Smokeless Tobacco Health Education Act of 1986 ("Smokeless Tobacco Act"), 15 U.S.C. §§ 4401 *et seq.*

The Alcohol Act is instructive because it parallels the Cigarette Act in important regards.<sup>7</sup> Like the Cigarette Act, it starts with a statement of purpose and policy. 27 U.S.C. § 213.<sup>8</sup> Although somewhat more detailed than the equivalent provision in the Cigarette Act, 15 U.S.C. § 1331, it states a similar intent to strike a balance between the public's need for information about health risks and the need to protect "commerce and the national economy." In both statutes, Congress itself dictates the contents of the required warnings.<sup>9</sup> The Alcohol Act, like the Cigarette Act, also contains a broadly-worded preemption provision. 27 U.S.C. § 216. Using language very similar to that in the Cigarette Act, the Alcohol Act provides that "[n]o statement relating to alcoholic beverages and health, other than the statement required by [this Act], shall be required under State law" on any container or box or other packaging of alcoholic beverages.<sup>10</sup>

There is strong evidence that use in the Alcohol Act of the same kind of preemption provision used in the Cigarette Act was thought by its drafters also to preclude state tort actions for failure to warn. In the original version of S. 2047, the bill that ultimately became the Alcohol Act, a savings clause had been inserted which said that:

Nothing in this section shall be construed to relieve any person from any liability under Federal or State law to any other person.

<sup>7</sup> The most significant difference is that the Alcohol Act is limited to warnings on beverage containers and packaging; the Act does not address advertising.

<sup>8</sup> Section 213 is set out in Stat. App. at A-1.

<sup>9</sup> Compare 15 U.S.C. § 1333 with 27 U.S.C. § 215(a).

<sup>10</sup> The Alcohol Act defines "state law" to include "statutes, regulations, and principles and rules having the force of law." 27 U.S.C. § 214 (11). This definition is consistent with the numerous court opinions that have held that the terms "law" or "state law" include common law rules, *see, e.g., Norfolk & W. R. Co. v. Train Dispatchers*, 111 S. Ct. 1156, 1163 (1991); *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 71, 79 (1938), and with the definition of "state law" in other federal statutes. *See, e.g.,* 29 U.S.C. § 1144(c)(1) (ERISA) (defining "state law" to include "laws, decisions, rules, regulations, or other State action having the effect of law"). There is no reason to

S. 2047(g), reprinted in *Alcohol Warning Labels: Hearing Before the Subcommittee on the Consumer of the Sen. Comm. on Commerce, Science, and Transportation*, 100th Cong., 2d Sess. 4, 10 (1988). The bill was subsequently amended to replace a lengthy series of findings on the health consequences of alcohol use and abuse with the current Declaration of Policy and Purpose, focusing (as does the equivalent provision of the Cigarette Act) on balancing economic and health goals. In addition, the savings clause was eliminated and, in its place, the broad preemption provision noted above was added.

This history suggests that, as the purpose of the legislation changed from a purely public health measure to an accommodation between economic and health concerns, Congress dropped the savings clause for the express purpose of precluding those state tort actions that endanger the accommodation.<sup>11</sup> It would seem odd indeed for Congress to use virtually the same language in the Alcohol Act that it did in the Cigarette Act while anticipating that one provision would be interpreted to preempt all inconsistent state actions including tort remedies and that the other would not.

believe Congress meant the term "state law" in the Cigarette Act, 15 U.S.C. § 1334(b), where it is undefined, to have any different meaning.

<sup>11</sup> Although comments during floor debate should be used cautiously in determining congressional intent, the discussion of preemption prior to enactment of the Alcohol Act lends further credence to the view that Congress intended the Act to displace state tort actions. In describing the legislation to the Senate immediately prior to its passage, Senator Ford stated:

One of the most difficult provisions to reach agreement on in this measure was the preemption language of section 205 [27 U.S.C. § 216]. This section was critical to the success of the negotiations and to my support of it. . . . In an attempt to minimize the burden on what is a legitimate and responsible industry, the preemption provisions of this act avoid what could otherwise be a multitude of inconsistent statutes, regulations, and common law rules. . . . It is my understanding that this section is to be [read] and administered so as to preclude any State or local authority, through legislation, regulation, or judicial interpretation, from requiring a different warning [label] on beverage alcohol containers. We intend that Congress exclusively reserve the power to consider whether, due to future developments or other considerations, any additional or differential warnings will be required on beverage alcohol containers.

134 CONG. REC. S17301 (daily ed. Oct. 21, 1988) (emphasis added). Similarly, just prior to House passage of the Act, Representative Coehlo told his colleagues:

Furthermore, Congress followed the Cigarette Act model in the face of a consensus of court decisions finding the Cigarette Act to preempt duty to warn actions. At the time the Alcohol Act was passed late in 1988, every federal Court of Appeals that had considered the issue had found state tort law to be preempted by the Cigarette Act. See *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230 (6th Cir. 1988); *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987); *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986), cert. denied, 479 U.S. 1043 (1987). Congress' use of almost identical statutory language in the face of these highly publicized judicial interpretations arguably evinces agreement with the result reached by the courts.<sup>12</sup>

The Smokeless Tobacco Act, 15 U.S.C. § 4401 *et seq.*, presents a telling contrast. Like the Cigarette and Alcohol Acts, the Smokeless Tobacco Act also sets out the text of the required warning, *id.* § 4402. The statute has a preemption provision that prohib-

To avoid a crazy quilt of inconsistent statutes, regulations and common law rules that would subject alcoholic beverages to intolerable burdens, section 205 [27 U.S.C. § 216] makes clear that under the act the power to regulate the labeling of alcoholic beverages to achieve public health objectives rests exclusively with the Congress.

134 CONG. REC. H11250 (daily ed. Oct. 21, 1988) (emphasis added). Contrary statements, denying an intent to preempt tort law, were inserted into the record by two Congressmen after the statute was enacted, see 134 CONG. REC. E3764 (daily ed. Nov. 10, 1988) (statement of Rep. Conyers); *id.* at E3729 (statement of Rep. Waxman). Post-enactment statements such as these, however, have little, if any, interpretive value because they were not before Congress at the time it decided whether, and in what form, to pass the legislation. See, e.g., *Pittstown Coal Group v. Sebben*, 488 U.S. 105, 118-119 (1988); *Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 132 (1974).

<sup>12</sup> While the decisions in question found implied rather than express preemption, that distinction was unlikely to have affected Congress' thinking. The main point is that Congress could not have had any significant doubt that its new initiative would be interpreted by the courts as preempting inconsistent tort requirements. For example, during consideration of the Alcohol Act, Senator Harkin inserted an article from *The New Republic* into the Congressional Record. That article discussed the fact that the Cigarette Act had been held in *Cipollone* to prevent recovery for failure to warn and suggested that the pending alcohol labeling legislation would benefit alcoholic beverage manufacturers by similarly protecting them from such suits. 134 CONG. REC. S8821-22 (daily ed. June 29, 1988).



its the requirement of any other statement by "any State or local statute or regulation." *id.* § 4406(b). Unlike the Cigarette and Alcohol Acts, it provides that, "Nothing in this chapter shall relieve any person from liability at common law or under State statutory law to any other person." *Id.* § 4406(c).<sup>13</sup>

This important difference between the Smokeless Tobacco Act and the Cigarette and Alcohol Acts is attributable to the different purposes of the respective sets of laws. The Smokeless Tobacco Act is wholly a public health measure; nowhere on the face of the statute is one word said about balancing health concerns against the competing claims of interstate commerce and the national economy. Indeed, the legislative history of the Act makes abundantly clear that Congress did not have balancing in mind.

The reason is that the economic and health aspects of the equation were, in Congress' view, quite different in the case of smokeless tobacco. First, compared with the cigarette and alcoholic beverage industries, the impact of smokeless tobacco on the national economy was minor. Cigarettes and alcoholic beverages are much larger industries, with spillover effects on many other sectors of the economy. Thus, their fiscal "health" was a legitimate concern of Congress. The House Report on the original Cigarette Act noted that the effects of regulation of health warnings could be felt by "the entire tobacco raising and manufacturing industry, and the numerous businesses which market tobacco products," including "the television, radio, and publishing industries." H.R. REP. NO. 449, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. CODE CONG. & ADMIN. NEWS 2350, 2352. The Senate Report on the Alcohol Act stresses that the choice of a single warning for all beer, wine and spirits is intended "to avoid misleading information and minimize burdens on interstate commerce." S. REP. NO. 100-596, 100th Cong., 2d Sess. 5 (1988). Without reasonable, uniform directions on how to accommodate their business practices to the public need for health information, the cigarette and alcohol industries and associated businesses could suffer considerable financial harm in the form of a tangle of inconsistent local statutes and regulations as well as from the potential for unpredictable and significant tort claims.

<sup>13</sup> This is the same language that appeared in the original Senate version of the Alcohol Act, and was later deleted.

Furthermore, because Congress could count on a considerable reservoir of already-existing public knowledge about both alcoholic beverages<sup>14</sup> and cigarettes<sup>15</sup> — which did not, in Congress' view, exist in the case of smokeless tobacco<sup>16</sup> — it was able, responsibly, to balance its desire to provide consumers with clear, non-confusing information on risks, while at the same time preserving for the cigarette and alcohol industries freedom from "a multiplicity of State and local regulations" and "chaotic marketing conditions."<sup>17</sup> It would have made no sense, given the factual circumstances and Congress' dual goals, either for Congress to have included a savings

<sup>14</sup> Congress recognized when it enacted the Alcohol Act that the public was already very well-informed about risks associated with alcohol consumption and abuse. Comments about the high degree of public awareness of the major health effects of alcoholic beverage abuse appear throughout the legislative history of the Alcohol Act, often supported by references to national polling data. *See, e.g.*, 134 CONG. REC. H11249 (daily ed. Oct. 21, 1988) (statement of Rep. Coehlo) (awareness is "nearly universal"); *id.* at S17301 (statement of Sen. Ford) (awareness is "widespread"). As a result, Congress characterized its purpose in requiring the statutory warning as providing a "reminder". 27 U.S.C. § 213.

<sup>15</sup> As a result of the enormous publicity surrounding the 1964 Surgeon General's Report on Smoking and Health and the vigorous public education campaign it generated, the House Committee on Interstate and Foreign Commerce observed in 1965 that "many persons . . . already are aware of the smoking and health issue." H.R. REP. NO. 449, *supra*, 1965 U.S. CODE CONG. & ADMIN. NEWS at 2352. The House Report notes that, largely as a result of this publicity, one out of four adult male smokers had given up cigarettes in the previous year. *Id.* In 1964, the year before the passage of the Cigarette Act, 81% of adults agreed that smoking is harmful to health. *Reducing the Health Consequences of Smoking: 25 Years of Progress, A Report of the Surgeon General* at 179 (DHHS Pub. No. (CDC) 89-8411, 1989).

<sup>16</sup> The 1964 Surgeon General's Report launched a national effort to educate the public on the risks associated with cigarette smoking. Congress concluded, however, that an unanticipated outcome of this campaign was to send some consumers in search of a "safe" substitute for cigarettes. Many apparently turned to smokeless tobacco products. According to Congress, the sales of products like snuff and chewing tobacco burgeoned because some were "under the mistaken impression that the use of smokeless tobacco carries no significant risk to health," and was "a safe and healthful alternative to cigarettes." S. REP. NO. 99-209, 99th Cong., 2d Sess. 4, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 7, 10. The exclusive purpose of the smokeless tobacco legislation, therefore, was to close this perceived information gap.

<sup>17</sup> H.R. REP. NO. 449, *supra*, 1965 U.S. CODE CONG. & ADMIN. NEWS at 2352 (Cigarette Act). *See also*, S. REP. NO. 100-596, 100th Cong., 2d Sess. 5 (1988) (Alcohol Act).



clause in this legislation, or to have chosen to tolerate any form of inconsistent state or local regulation of warnings, including that imposed by virtue of tort law.

When all these considerations are taken into account, the conclusion that the preemption language in the Cigarette Act reaches all state requirements relating to warnings is difficult to avoid. Because tort law judgments plainly impose requirements, they fall within the scope of the express preemption clause of the Act.

It is obvious from reading the *amicus* briefs on behalf of Petitioner that, in the case of cigarettes, many fervently disagree with the policy choice made by Congress to compromise between economic and health interests, and that they would like this Court to shift that balance. These sentiments may be widely shared. We respectfully submit, however, that this case is not a referendum on whether cigarettes should continue to be sold, or on whether Congress has found the right balance between health and economic concerns. Those policy questions are for Congress. The only question here is what Congress meant by the express language it used, and we submit that the answer to that question is clear.

**B. Preemption Is Implied From A Direct, Actual Conflict Between The Purposes of Congress And The Effect Of State Tort Actions For Failure To Warn.**

Even if this Court were to conclude that tort actions do not fall within the proscriptive ambit of the express preemption provision, the inquiry is not complete.<sup>18</sup> As this Court has said when deciding preemption questions, the "sole task is to ascertain the intent of Congress." *California Fed. Savings & Loan Ass'n v. Guerra*, 479

<sup>18</sup> Petitioner and certain *amici* for Petitioner argue that if the preemption provision in a statute does not expressly cover a particular form of state activity, this Court should end its inquiry. The cases cited for this proposition do not support the simplistic analysis urged by Petitioner. In both *California Fed. Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), and in *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987), which are cited for this proposition, the Court in fact engaged in a searching examination of the evidence of Congress' intent before deciding the preemption question. The Court looked at a variety of matters, including the history of the statutes, at other provisions of the acts, and at the

U.S. 272, 280 (1987). If the preemption provision alone supplies insufficient evidence of that intent or if no preemption provision exists, this Court's uniform practice has been to ask whether preemption can be implied from a combination of other indicia of intent. See, e.g., *International Paper Co. v. Ouellette*, 479 U.S. 481, 494-97 (1987) (Court finds partial preemption, despite savings clause, by examining congressional objectives under Clean Water Act).

One reason to find implied preemption is that state law "regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *English v. General Electric Co.*, 110 S.Ct. 2270, 2275 (1990). Another is that state law "actually conflicts with federal law." *Id.* These categories are not entirely discrete, often making it possible to think of the same problem either as one of field preemption or of actual conflict. *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 624-26 (1st Cir. 1987). Most courts to date have analyzed the Cigarette Act as posing a question of actual conflict. What is most important, however, is that the overwhelming majority of them have found an implied intent to preempt failure to warn actions by examining the face of the Act. The reasons for this will quickly be discerned by the Court.

**1. An Intent To Preempt Common Law Tort Remedies Is Implied By The Purpose, Structure And Language Of The Cigarette Act.**

The stated purposes of the Act, its structure, and the existence in it of a broad preemption provision all work together to make manifest an intent to settle the question of how cigarette manufacturers are to fulfill their duty to see that consumers are adequately informed about the health hazards associated with their product.

The purpose of the Cigarette Act is set out in 15 U.S.C. § 1331. This section speaks of Congress' intent to "establish a com-

possibility of an actual conflict between state and federal authority. Furthermore, in *Jones v. Rath Packing Co.*, 430 U.S. 519, 540-41 (1977), the Court, after failing to find express preemption, went on to conclude that state law was nonetheless impliedly preempted. These decisions evinced no inclination to apply some cut-and-dried summary approach to preemption analysis, and the Court is urged to continue to examine each case rigorously, fully and on its own merits. See pp. 25-29, *infra*.

prehensive Federal program to deal with cigarette labeling and advertising with respect to *any relationship between smoking and health*" (emphasis supplied); it then goes on to set out as dual goals the provision of adequate information to the public while at the same time providing protection of "commerce and the national economy" and preventing "diverse, nonuniform, and confusing regulations with respect to any relationship between smoking and health." Clearly, Congress was engaged in a balancing of interests.

In pursuit of the desired balance, Congress dictated the actual wording of the health warning. 15 U.S.C. § 1333. It also added the preemption provisions in § 1334(a) and (b), which prohibit the imposition on manufacturers by the states of any additional requirement with regard to labeling or any prohibition or requirement with regard to advertising or promotion of cigarettes. All of this careful crafting was obviously intended to provide cigarette manufacturers with the considerable business benefit of a dependable, predictable way to fulfill their responsibilities to caution consumers.

Petitioner and his *amici* concede that Congress wanted to displace direct regulatory activity by the states with regard to warnings so that the manufacturers, and the nation's economy, could enjoy the benefits of this scheme. In effect, however, they argue that Congress was perfectly willing to see its carefully crafted compromise undone by the regulatory effect of common law tort actions imposing, on an *ad hoc* basis, a hodgepodge of additional requirements. This argument is absurd on its face, and it is little wonder that very few courts have accepted it. The handful of courts that have rejected preemption seem to have based their decisions more on a dislike for Congress' choice of policy than on a sound, objective preemption analysis. We suggest that this Court need look no further than the face of this statute—at what Congress said about its intent and expectations—to decide that the law does indeed preempt tort actions relating to health warnings.

## **2. The Arguments Against Implied Preemption Are Not Persuasive.**

### **(a) Preemption Should Not Be Denied Simply Because Congress Has Provided No Alternative Remedy.**

Petitioner relies heavily on this Court's decision in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), for the proposition that

the presumption against preemption should be applied with special rigor in cases where individuals would otherwise be deprived of traditional state tort remedies. Petitioner cites to language in Justice Blackmun's dissent that, out of context, seems to support that argument. 464 U.S. at 263-64. But the reason that state tort actions were not found to be preempted in *Silkwood* turns out upon examination to have been on quite different grounds.

The Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 *et seq.*, was designed by Congress to place the safety regulation of nuclear facilities in the hands of the federal government. The Act was, however, silent on the subject of remedies for individuals injured by radiation from such facilities. When this Court examined all the evidence surrounding the Act, however, it found clear indication that Congress had no intention of displacing the right of injured persons to recover under state tort law. This evidence was supplied by a subsequent amendment to the Act, the 1957 Price-Anderson Act, Pub. L. 85-256, 71 Stat. 576. The Price-Anderson Act set a ceiling on the aggregate amount of damage awards that could be imposed on a facility for a single nuclear incident; from this, the Court not surprisingly inferred that Congress had intended state tort remedies to be unaffected when it passed the earlier Atomic Energy Act. 464 U.S. at 251-53.

Had it not been for this exceedingly unambiguous signal of congressional understanding, the case might well have come out differently. Justice White, writing for the majority, in fact stated that, "[T]his concern over the States' inability to formulate effective standards and the foreclosure of the States from conditioning the operation of nuclear plants on compliance with state-imposed safety standards arguably would disallow resort to state-law remedies by those suffering injuries from radiation in a nuclear plant." *Id.* at 250-51.

No comparable evidence of intent to allow tort actions can be found within the provisions of the Cigarette Act. The mere fact that some remedies which might otherwise be available to plaintiffs in state courts are removed is not, in and of itself, sufficient to require a rigid and inflexible application of the presumption against preemption where, as in the Cigarette Act, the statute itself so clearly



evinces Congress' legitimate aims. Furthermore, Petitioner and amici for Petitioner exaggerate the effect of preemption to the extent that they suggest that affirmance of *Cipollone* will strip consumers of all tort remedies for physical harm attributable to cigarettes. That is simply not so; only those claims that conflict with the objective of a unitary federal system of regulating the labeling, advertising, and promotion of cigarettes are preempted.

**(b) Congress Struck A Balance Between Economic And Health Goals In Drafting The Cigarette Act, And The States Are Not Free To "Improve" Upon That Balance Through Tort Rules.**

Petitioner's argument that tort actions further the purposes of the Cigarette Act rests on an idiosyncratic reading of the statute that distorts its purposes. Under this interpretation, the overriding goal of the Cigarette Act is to inform the public adequately about the health risks of smoking. Protection of commerce and of the national economy was merely an incidental, secondary consideration. Tort remedies for failure to warn, it is said, merely further Congress' purpose. *Carlisle v. Philip Morris, Inc.*, 805 S.W.2d 498, 510-11 (Tex. Ct. App. 1991); *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 87-88, 577 A.2d 1239, 1248 (1990).

The Act does say that Congress intended that the public be informed about health risks by means of labeling. But it also says that Congress intended to protect the national economy "to the maximum extent possible consistent with [the] declared policy" of the Act. Importantly, *Congress itself* decided how to accommodate the informational and economic values, and it did not invite the states to rework that balance according to their own predilections. Congress decided that the way to achieve both the economic and informational goals was to draft the specific warning message itself and to prohibit the states from establishing any other requirements. Thus, the Cigarette Act was not so predominantly a public health measure that courts are justified in jettisoning Congress' economic goals. Rather, the Act was a compromise over which Congress exercised plenary control. The "narrow" approach to public health taken by

the Act, reconciling public health goals with economic ones, has been acknowledged by courts for close to two and a half decades. See *Banzhaf v. Federal Communications Comm'n*, 405 F.2d 1082, 1090-91 & n.25 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

If, as *Carlisle* and *Dewey* seem to assume, Congress had intended to maximize the amount of health information cigarette manufacturers must make available to consumers each time they pick up a pack or look at an advertisement, the structure it adopted for the Cigarette Act was certainly an odd way to go about it. The only reasonable conclusion is that Congress did not have the objective that the *Carlisle* and *Dewey* courts, and Petitioner, have attributed to it.

**(c) State Tort Remedies Based On Failure To Warn Actually And Directly Conflict With The Operation Of The Cigarette Act.**

Petitioner's argument that no direct conflict exists between the Cigarette Act and state tort remedies for failure to warn is borrowed from *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984). In a case involving the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136 *et seq.*, the *Ferebee* court concluded that tort remedies for failure to warn did not conflict with the federally-mandated warnings because manufacturers could comply with both federal and state law by simultaneously using the federally-approved label and paying tort damages.

The *Ferebee* reasoning splits hairs in a fashion worthy of a medieval scholiast. The Court of Appeals for the First Circuit made short work of this argument in *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987). Calling it "disingenuous," the court added:

This 'choice of reaction' seems akin to the free choice of coming up for air after being underwater. Once a jury has found a label inadequate under state law, and the manufacturer



liable for damages for negligently employing it, it is unthinkable that any manufacturer would not immediately take steps to minimize its exposure to continued liability. The most obvious change it can take, of course, is to change its label.

*Id.* at 627-28. The exercise by cigarette manufacturers of their "free choice" to change their labels in the face of a variety of state court decisions would, to be sure, totally defeat Congress' stated goal of protecting against "diverse, nonuniform, and confusing cigarette labeling and advertising regulations."

Petitioner's *amici* try to avoid this obvious problem with their argument in two ways. Some say that there need be no lack of uniformity because manufacturers can use in all states the version of the warning that would satisfy the most stringent of the varying state standards. Brief of the National League of Cities, *et al.*, at 26 & n. 20. Presumably, this would mean warning about every conceivable health effect of smoking, an approach which, whether or not it meets the test of uniformity for a given manufacturer, certainly fails miserably under the "nonconfusing" standard.<sup>19</sup> In addition, this approach would not address the problem of nonuniformity of warnings *among* manufacturers as each company tries to come up with its own response to the threat or reality of failure-to-warn suits.

<sup>19</sup> As a policy matter, furthermore, overly comprehensive warning messages can be counterproductive. Experts agree that "overwarning" can lead consumers to disregard information. See, e.g., Twerski, Weinstein, Donaher & Piehler, *The Use and Abuse of Warnings in Products Liability - Design Defect Litigation Comes of Age*, 61 Cornell L. Rev. 495, 514 (1976); Schwartz & Driver, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory*, 52 U. Cin. L. Rev. 38, 60 (1983). This point was acknowledged recently by the Occupational Safety and Health Administration (OSHA). The amount of warning information on chemicals in the workplace should be minimized, said OSHA, because:

This approach is in keeping with the Agency's evaluation of available data on effectiveness . . . which indicates that the more detail there is on a label, the less likely it is that employees will read and act on the information.

53 Fed. Reg. 29841 (1988). Petitioner's *amici* have not explained why product warnings should be controlled by the state whose law is the least consistent with sound communications theory, and the most disrespectful of Congress' intent to protect national commerce.

Others blithely suggest that the manufacturers can leave their label warnings alone and instead fulfill their common law duty to warn by package inserts, public service announcements, warning brochures, instruction manuals, and general educational programs. See Brief *Amicus Curiae* of the American Cancer Society *et al.* at 17; Brief *Amicus Curiae* of the Five Former Surgeons General *et al.* at 10-12. This argument is spurious; indeed no support for it is offered.

First, if state courts were free to require a variety of these alternative methods of warning, the goal of a uniform regulatory scheme for cigarette manufacturers would be defeated as surely as if courts were to require *ad hoc* amendments to the current federally mandated warnings on cigarette packs and in advertisements. Congress decided on the warnings manufacturers must give and on the places where they must give them. It did so to provide businesses with the benefit of a method they could depend on to meet their responsibility to consumers in a clear, nonconfusing way.<sup>20</sup> The suggestion of Petitioner's *amici* is no more or less than a clever attempt to accomplish an end run around Congress' objectives.

This observation has special pertinence to the suggestion that package inserts—rather than changes in the warnings on the packages—could be used to fulfill the common law requirements. Pack-

<sup>20</sup> To understand the business significance of a uniform regulatory scheme, the Court must take into account the uncertainties that currently attend a manufacturer's efforts to meet its common law duty to warn. Tort rules are applied on an *ad hoc* basis. As a result, one way businesses can respond is to change a product warning after each successful lawsuit. Not only are considerable expenses entailed in constant revisions of this sort, but the manufacturer must also decide what to do with products already in the stream of commerce. Do they need to be recalled? Must additional warnings be communicated as to them, and, if so, how? Alternatively, a manufacturer could respond by trying at the outset to devise the most comprehensive warning imaginable. This approach, however, may result, as already discussed, in an ineffective warning. Also, as a practical matter, it is virtually impossible to craft a warning, however comprehensive, that is certain to satisfy all courts and all juries. See, e.g., *MacDonald v. Ortho Pharmaceutical Corp.*, 394 Mass. 131, 475 N.E.2d 65, 71-72 (up to jury to decide whether the government-approved language chosen for the warning adequately alerted plaintiff to the risk of strokes from use of oral contraceptives), *cert. denied*, 474 U.S. 920 (1985). These are precisely the uncertainties a uniform statutory scheme avoids.

age inserts are merely another form of labeling.<sup>21</sup> To distinguish package inserts from what appears on the outside of the package, therefore, is a particularly sophisticated attempt to defeat Congress' intent.

Furthermore, it is far from clear under the law of most states that the alternatives suggested by Petitioner's *amici* would in fact be deemed adequate alternatives to warnings on the cigarette pack itself. Public service announcements and educational programs may reinforce warnings on the product, but they have yet to be held to be a substitute for them. Cigarettes are not complex equipment like a car or a chain saw, and the suggestion that they be sold with instruction manuals or brochures is replete with so many practical problems as to be absurd on its face.

In any event, manufacturers have no assurance that state courts will find warnings that appear in places other than on the outside of the package a satisfactory way to meet their duty at common law. In many states, part of the calculus for the jury in deciding the adequacy of a warning is whether its placement is adequate.<sup>22</sup> Warnings are typically expected to be on the product itself or on its packaging, and liability may be imposed if the cautionary information appears solely in a booklet or is otherwise not placed directly on the product or its packaging.<sup>23</sup> For that reason, it is standard practice to advise manufacturers to place safety warnings directly on the product or package so that the information can be seen whenever the consumer uses it. Ross, *Legal and Practical Considerations for the*

<sup>21</sup> See, e.g., *Lukaszewicz v. Ortho Pharmaceutical Corp.*, 510 F. Supp. 961, 964 (package inserts referred to as labeling), modified, 532 F. Supp. 211 (E.D. Wis. 1981); *Feldman v. Lederle Laboratories*, 234 N.J. Super. 559, 561 A.2d 288, 299 (App. Div. 1989) (same), cert. granted, 122 N.J. 348 (1990); *MacDonald v. Ortho Pharmaceutical Corp.*, 394 Mass. 131, 475 N.E.2d 65, 70 (same), cert. denied, 494 U.S. 920 (1985).

<sup>22</sup> See, e.g., *Bickram v. Case I.H.*, 712 F. Supp. 18, 22 (E.D.N.Y. 1989) (applying New York law); *Pell v. Victor J. Andrew High School*, 123 Ill. App. 3d 423, 78 Ill. Dec. 739, 462 N.E.2d 858, 863 (1984); *Ilosky v. Michelin Tire Corp.*, 307 S.E.2d 603, 611 (W. Va. 1983).

<sup>23</sup> See, e.g., *Gordon v. Niagara Machine & Tool Works*, 574 F.2d 1182, 1185-88 (5th Cir. 1978) (Mississippi) (warning solely in product literature inadequate); *Griggs v. Firestone Tire & Rubber Co.*, 513 F.2d 851 (8th Cir.) (Missouri) (same), cert. denied, 423 U.S. 865 (1975); *Ilosky*, 307 S.E.2d at 611 (same).

*Creation of Warning Labels and Instruction Books*, Prac. Law Inst. Litigation and Administrative Practice Course Handbook No. 379: Litigation 103, 116 (1989). As a result, no one can safely predict that the common law duty to warn can be met while leaving the labeling on the cigarette pack itself untouched.

In summary, if this Court reverses the Third Circuit, it will indeed pave the way for an actual conflict, and one of a very serious sort. Petitioner attempts to characterize this conflict merely as an acceptable "tension" between state and federal objectives. This is not "tension"; it is an outright pitched battle in which state authority, if permitted, would directly undercut the goals the Act was designed to achieve.<sup>24</sup>

Duty to warn cases are a particularly vexing area of products liability law. The difficulty in anticipating what future courts and juries will find to be inadequate makes sensible business decisions about product information hard to reach. With a mass-marketed product, the potential liability for an incorrect guess, particularly in light of the real risk of repeated punitive damage awards, could easily be crippling. Congress chose—clearly and unambiguously—to prevent health and safety information from becoming a vehicle for, in the words of the *Banzhaf* court, "compelling the cigarette companies to dig their own graves." 405 F.2d at 1090. This economic calculus could easily be undone by a formalistic "actual conflict" analysis that ignores the real-world implications of the industry's "choice of reactions."

## II. REVERSING THE THIRD CIRCUIT USING THE ANALYTICAL FRAMEWORK SUGGESTED BY PETITIONER WOULD RESULT IN FORECLOSING PRE-EMPTION CLAIMS UNDER NUMEROUS OTHER STATUTES

Given the strong evidence of congressional intent outlined above, it is scarcely surprising that, in all but two of the jurisdic-

<sup>24</sup> As the discussion at pp. 13–16, *supra*, shows, the express preservation of common law remedies in the Smokeless Tobacco Act cannot be used to argue that the conflict between tort remedies and the goals of the Cigarette Act is a tension that Congress intended to tolerate in tobacco health warning legislation. Judge Mazzone's use of the Smokeless Tobacco Act for this purpose in *Palmer v. Liggett*



tions that have thus far considered the question, the prevailing rule is that duty to warn claims are indeed preempted. Petitioner urges this Court to disregard that strong consensus among state and federal courts. Furthermore, he urges the Court to reach that result by applying a rule that represents a serious misreading of existing law. The Court should find, Petitioner argues, that Congress cannot displace state tort remedies unless it either expresses its intent to do so "with drastic clarity" or there is no conceivable sense, however unsatisfactory, in which federal and state law can coexist.

This Court should clearly and firmly reject the invitation to adopt a rule that would exclude preemption except in cases where Congress makes its will known not only by explicitly addressing the result it seeks to achieve, but by detailing as well the means to that end. Certainly, that approach would not be consistent with established precedent. For example, in *International Paper Co. v. Ouellette*, a case in which a common law tort remedy was found to be preempted despite a broad savings clause, Justice Powell, writing for the majority, said flatly, "[I]t is not necessary for a federal statute to provide explicitly that particular state laws are preempted." 479 U.S. 481, 491 (1987). Instead, the Court has decided preemption questions by highly fact-specific inquiries into each piece of legislation and each particular alleged conflict. What the Court has sought to discern by careful examination of the purpose, structure, and language of the statute is whether Congress' intent to displace state law is made "clear and manifest." *English v. General Electric Co.*, 110 S. Ct. 2270, 2279 (1990).

"Clear and manifest" does not mean beyond a reasonable doubt. It does not mean that Congress must express its intent with absolute precision and in elaborate detail. The presumption against preemption, as historically applied, serves to accommodate the concerns of federalism while at the same time facilitating the operation of the Supremacy Clause. By suggesting that preemption should be found only where Congress speaks with "drastic clarity" or where no alternatives, however far-fetched, would allow state and federal

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*Group, Inc.*, 633 F. Supp. 1171, 1179 (D. Mass. 1986), *rev'd*, 825 F.2d 620 (1st Cir. 1987) altogether ignores the crucial differences between the two statutes that explain why tort remedies frustrate the purpose of one act but not the other.

law to coexist, Petitioner seeks to shift the underlying nature of that accommodation.

The reason for doing so in this case is far from clear. This is not, after all, a matter which implicates state sovereignty under the Eleventh Amendment; there a drastic clarity standard serves an intelligible structural purpose, rooted in the shape and language of the Constitution. This is a case solely implicating the exercise of power by Congress under the Commerce Clause. That an exercise of this power can displace state law should not be treated as a lamentable result to be avoided whenever possible, but rather the unremarkable outcome of the original constitutional decision to cede authority over interstate commerce to a federal legislative body and to back that authority with the weight of the Supremacy Clause.

Were the Court to pursue the path suggested by the Petitioner, it would work a structural change in this original agreement. The presumption against preemption would be elevated into an affirmative barrier, a stumbling block thrust by the judiciary onto the path Congress takes to effectuate its legitimate legislative goals. This would tip the balance in federal-state relations as sharply out of equilibrium as would a broad presumption in favor of preemption.

This Court's traditional practice of highly particularized treatment of preemption cases under the Commerce Clause recommends itself on pragmatic as well as theoretical grounds. As noted in an earlier section of this brief, Congress will rarely be able to foresee with unerring accuracy every development in state law that could result in a defeat or distortion of the goals of a federal law. The Cigarette Act, for example, was passed at a time when the law of products liability was in its infancy. Few would have predicted, we think, the complexities that now attach in various states to the common law duty to warn. It would be unrealistic and obstructive to require that Congress accommodate the unpredictable future by amending legislation to adapt to every relevant new tort rule.

A further benefit of the Court's careful, individualized analysis of preemption claims is that it avoids the inadvertent disposition of other cases. Should the Court, as we urge, affirm the Third Circuit in its usual fact-specific way, preemption claims arising under other statutory structures will not be prematurely decided. But if the Court



were to reverse the Third Circuit using the analytical scheme urged by Petitioner and his *amici*, the effect would be to automatically foreclose preemption claims by a wide range of manufacturers under numerous other statutes.

Untimely preclusion, of course, is precisely the result that Petitioner is urging. In his view, a sweeping "drastic clarity" rule would be a good thing, an effective way to put out what he characterizes perjoratively as a "prairie fire" of preemption. By this, he refers to litigation arising under a wide variety of statutes and affecting a broad range of American industry. These statutes have in common a goal of achieving a degree of nationwide uniformity in matters such as safety standards and product information. In addition to the Alcohol Act, discussed above, examples of statutes with preemption provisions are FIFRA, 7 U.S.C. § 136v; the Medical Device Amendments to the Food, Drug, and Cosmetic Act, 21 U.S.C. § 360k(a); and the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1392(d). Other statutory schemes lack preemption provisions but have nevertheless presented questions of whether or not it is appropriate for states to regulate in the same area by means of their tort law. Requirements by the Food and Drug Administration for warning information on drugs are an example.

In some areas, for example FIFRA, the lower courts have divided on the preemption question.<sup>25</sup> In others, for example cases covered by the Medical Device Amendments, support for a finding of preemption has been essentially uniform, much as in the cigarette litigation.<sup>26</sup> In still other instances, for example those relating to

<sup>25</sup> See, e.g., *Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991) (state tort claims pre-empted), petition for cert. filed, 59 U.S.L.W. 3825 (U.S. May 29, 1991) (No. 90-1837); *Fisher v. Chevron Chem. Co.*, 716 F. Supp. 1283 (W.D. Mo. 1989) (same); *Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404 (E.D. Mich. 1987) (same); but see *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir.) (no preemption), cert. denied, 469 U.S. 1062 (1984); *Cox v. Velsicol Chem. Corp.*, 704 F. Supp. 85 (E.D. Pa. 1989) (same); *Roberts v. Dow Chem. Co.*, 702 F. Supp. 195 (N.D. Ill. 1988) (same).

<sup>26</sup> See, e.g., *Moore v. Kimberly-Clark Corp.*, 867 F.2d 243 (5th Cir. 1989); *Lindquist v. Tambrands, Inc.*, 721 F. Supp. 1058 (D. Minn. 1989); *Rinehart v. International Playtex, Inc.*, 688 F. Supp. 475 (S.D. Ind. 1988); *Lavetter v. International Playtex*, 706 F. Supp. 722 (D. Ariz. 1988); *Stewart v. International Playtex, Inc.*, 672 F. Supp. 907 (D.S.C. 1987); *Berger v. Personal Products,*

regulation under the Food and Drug Act, claims have thus far been largely unsuccessful.<sup>27</sup>

We do not take a position on the merits of any of these preemption questions or on the validity of the existing precedent concerning these questions. They are not before the Court. Rather, we would like simply to point out that manufacturers, when they invoke a preemption defense under these federal statutes, are not behaving deviously or distorting the "benign" intentions of the law. Indeed, it would seem a quite reasonable *quid pro quo* for compliance with a national regulatory scheme that the regulated industry have the benefit of a set of instructions which, if followed, satisfy an industry's affirmative duties in the regulated area. It is not beyond belief that Congress could, in some if not all of the examples invoked by the Petitioner in his "parade of horrors," have intended just such a result. A rule of "drastic clarity" or a requirement of absolute conflict, either of which would deprive the Court of the ability to examine all the relevant evidence and make a reasoned judgment, could effectively decide the outcome of all these cases without regard to the purposes of Congress or its economic judgments. We urge the Court to avoid this draconian and unnecessary outcome.

*Inc.*, 115 Wash. 2d 267, 797 P.2d 1148 (1990), cert. denied, 111 S. Ct. 1584 (1991).

<sup>27</sup> See, e.g., *Allen v. G.D. Searle & Co.*, 708 F. Supp. 1142 (D. Or. 1989) (state tort actions not pre-empted by federal regulation of intrauterine contraceptives); *MacDonald v. Ortho Pharmaceutical Corp.*, 394 Mass. 131, 475 N.E.2d 65, cert. denied, 474 U.S. 920 (1985) (tort action for duty to warn not preempted by federal labeling requirements).

## CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

*Respectfully submitted,*

*Of Counsel:*

JAN S. AMUNDSON

*General Counsel*

QUENTIN RIEGEL

*Deputy General Counsel*

National Association of

Manufacturers

1331 Pennsylvania Avenue, N.W.

Suite 1500 — North Lobby

Washington, D.C. 20004-1703

(202) 637-3058

*Date: July 10, 1991*

DIANE L. ZIMMERMAN

*Counsel of Record*

GARY E. CRAWFORD

SKADDEN, ARPS, SLATE,

MEAGHER & FLOM

919 Third Avenue

New York, New York 10022

(212) 735-3000

*Counsel for Amicus Curiae*

## STATUTORY APPENDIX

### Federal Cigarette Labeling and Advertising Act: 15

#### U.S.C. § 1334

(a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

### Medical Device Amendments of 1976: 21 U.S.C. § 360k(a)

[N]o State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement —

(1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and

(2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.

### Alcoholic Beverage Labeling Act of 1988: 27 U.S.C. § 216

No statement relating to alcoholic beverages and health, other than the statement required by section 215 of this title, shall be required under State law to be placed on any container of an alcoholic beverage, or on any box, carton, or other package, irrespective of the material from which made, that contains such a container.

### Alcoholic Beverage Labeling Act of 1988: 27 U.S.C. § 213

The Congress finds that the American public should be informed about the health hazards that may result from the consumption or abuse of alcoholic beverages, and has determined that it would be beneficial to provide a clear,

nonconfusing reminder of such hazards, and that there is a need for national uniformity in such reminders in order to avoid the promulgation of incorrect or misleading information and to minimize burdens on interstate commerce. The Congress finds that requiring such reminders on all containers of alcoholic beverages is appropriate and necessary in view of the substantial role of the Federal Government in promoting the health and safety of the Nation's population. It is therefore the policy of the Congress, and the purpose of this subchapter, to exercise the full reach of the Federal Government's constitutional powers in order to establish a comprehensive Federal program, in connection with the manufacture and sale of alcoholic beverages in or affecting interstate commerce, to deal with the provision of warning or other information with respect to any relationship between the consumption or abuse of alcoholic beverages and health, so that—

(1) the public may be adequately reminded about any health hazards that may be associated with the consumption or abuse of alcoholic beverages through a nationally uniform, nonconfusing warning notice on each container of such beverages; and

(2) commerce and the national economy may be—

(A) protected to the maximum extent consistent with this declared policy,

(B) not impeded by diverse, nonuniform, and confusing requirements for warnings or other information on alcoholic beverage containers with respect to any relationship between the consumption or abuse of alcoholic beverages and health, and

(C) protected from the adverse effects that would result from a noncomprehensive program covering alcoholic beverage containers sold in interstate commerce, but not alcoholic beverage containers manufactured and sold within a single State.



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1991

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THOMAS CIPOLLONE, individually and as Executor  
of the Estate of Rose D. Cipollone,  
*Petitioner,*  
v.

LIGGETT GROUP, INC., a Delaware Corporation;  
PHILIP MORRIS INCORPORATED, a Virginia Corporation;  
and LOEW'S THEATERS, INC., a New York Corporation,  
*Respondents.*

---

On Writ of Certiorari to the  
United States Court of Appeals  
for the Third Circuit

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**MOTION FOR LEAVE TO FILE SUPPLEMENTAL  
POST-ARGUMENT BRIEF AND SUPPLEMENTAL  
POST-ARGUMENT BRIEF**

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*Of Counsel*

ALAN M. DARNELL  
WILENTZ, GOLDMAN &  
SPITZER, P.C.  
90 Woodbridge Center Drive  
P.O. Box 10  
Woodbridge, NJ 07095  
(908) 636-8000  
*Attorneys for Petitioner*

LAURENCE H. TRIBE  
1525 Massachusetts Ave.  
Cambridge, MA 02138  
(617) 495-4621  
MARC Z. EDELL \*  
BUDD LARNER  
GROSS ROSENBAUM  
GREENBERG & SADE, P.C.  
150 John F. Kennedy Parkway  
CN 1000  
Short Hills, NJ 07078  
(201) 379-4800  
*Attorneys for Petitioner*

\* Counsel of Record

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1991

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No. 90-1038

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THOMAS CIPOLLONE, individually and as Executor  
of the Estate of Rose D. Cipollone,  
*Petitioner,*

v.

LIGGETT GROUP, INC., a Delaware Corporation;  
PHILIP MORRIS INCORPORATED, a Virginia Corporation;  
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**On Writ of Certiorari to the  
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**MOTION FOR LEAVE TO FILE SUPPLEMENTAL  
POST-ARGUMENT BRIEF PURSUANT TO RULE 25.6  
OF THE RULES OF THE SUPREME COURT**

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Because of the potential significance of the question raised by Justices Stevens and Scalia during rebuttal regarding the seemingly asymmetrical scope of the "based on smoking and health" limitation; because the briefs submitted prior to the argument had not addressed that question; and because a dispositive statutory answer is

available once one focuses on the structural role of § 1334 (b) in the overall scheme of the statute as it stood both before and after the 1969 amendment, it would assist the Court and prejudice no one for the Court to consider this short post-argument submission. Accordingly, petitioner respectfully moves this Court, pursuant to Rule 25.6, for permission to file the attached post-argument brief.

Respectfully submitted,

*Of Counsel*

ALAN M. DARNELL

WILENTZ, GOLDMAN &  
SPITZER, P.C.

90 Woodbridge Center Drive  
P.O. Box 10  
Woodbridge, NJ 07095  
(908) 636-8000

*Attorneys for Petitioner*

LAURENCE H. TRIBE

1525 Massachusetts Ave.  
Cambridge, MA 02138  
(617) 495-4621

MARC Z. EDELL \*

BUDD LARNER

GROSS ROSENBAUM

GREENBERG & SADE, P.C.

150 John F. Kennedy Parkway  
CN 1000

Short Hills, NJ 07078

(201) 379-4800

*Attorneys for Petitioner*

\* Counsel of Record

January 14, 1992

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**SUPPLEMENTAL POST-ARGUMENT BRIEF**  
\_\_\_\_\_

Petitioner respectfully submits this post-argument brief to address a matter raised at oral argument that was not discussed in the briefs on the merits: the seemingly asymmetrical scope of the "based on smoking and health" limitation. Given its conceded role as a merely clarifying replacement for former § 1334(b) (Resp. Br. at 23-24 n.28), the current section must be read to mean that, insofar as state law, *on whatever grounds*, requires a "statement relating to smoking and health" in advertising or promotion, and therefore does what the States had in 1965 *lost authority to do with respect to the cigarette industry*, it *ipso facto* treats that industry distinctively and thus is sufficiently "based on smoking and health" to *remain* pre-empted; but, insofar as state law does *not* re-



quire any "statement" at all but merely *prohibits positive misstatements*, and therefore does only what the States demonstrably *had* authority to do prior to the clarifying amendment, it is "based on smoking and health" only if the *basis* of the underlying prohibition itself is a norm specific to smoking and health rather than a norm applicable to society generally.

Even if this Court concluded that the "based on" language played no meaningful role in limiting the preemptive scope of the statute, it should be noted that, pursuant to the express language of § 1334(a) and (b), liability for affirmative misrepresentations wherever made would remain non-pre-empted at least prior to 1969, and liability for affirmative misrepresentations made on cigarette packages or anywhere else except in "advertising or promotion" of cigarettes would remain non-pre-empted to the present. Similarly, liability for failure to warn, so long as it did not require a "statement . . . on any cigarette package" or constitute a "requirement or prohibition . . . with respect to the advertising or promotion" of cigarettes, would remain non-pre-empted to the present.

Respectfully submitted,

*Of Counsel*

ALAN M. DARNELL

WILENTZ, GOLDMAN &

SPITZER, P.C.

90 Woodbridge Center Drive

P.O. Box 10

Woodbridge, NJ 07095

(908) 636-8000

*Attorneys for Petitioner*

LAURENCE H. TRIBE

1525 Massachusetts Ave.

Cambridge, MA 02138

(617) 495-4621

MARC Z. EDELL \*

BUDD LARNER

GROSS ROSENBAUM

GREENBERG & SADE, P.C.

150 John F. Kennedy Parkway

CN 1000

Short Hills, NJ 07078

(201) 379-4800

*Attorneys for Petitioner*

\* Counsel of Record

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**BRIEF FOR THE RESPONDENTS IN RESPONSE  
TO THE SUPPLEMENTAL POST-ARGUMENT  
BRIEF OF PETITIONER**

H. BAETOW FARR, III \*  
RICHARD G. TARANTO  
KLEIN, FARR, SMITH & TARANTO  
2550 M Street, N.W.  
Washington, D.C. 20037  
(202) 775-0184

*Attorneys for Respondents*

*Of Counsel:*

MUDGE, ROSE, GUTHRIE,  
ALEXANDER & FERDON  
180 Maiden Lane  
New York, NY 10038

\* Counsel of Record

ARNOLD & PORTER  
1200 New Hampshire Ave., N.W.  
Washington, D.C. 20036

SHOOK, HARDY & BACON  
One Kansas City Place  
1200 Main Street  
Kansas City, MO 64105

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**BRIEF FOR THE RESPONDENTS IN RESPONSE  
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Petitioner evidently has abandoned the distinction—between tort law and other types of law—on which his argument against preemption of state law has heretofore rested, a withdrawal that is entirely appropriate given the holdings of this Court that tort duties do constitute “requirement[s] or prohibition[s] . . . imposed under State law” (§ 1334(b)). See, e.g., *San Diego Building*



*Trades Council v. Garmon*, 359 U.S. 236, 244, 246-47 (1959) (describing general tort duties as “requirements imposed by state law” that plainly regulate conduct); *see also* Resp. Br. at 28 & n.32. Although he no longer denies that the preempted field includes the judicial imposition of liability (*see* Supp. Br. at 2), petitioner now seeks to introduce several new distinctions into the statute for the purpose of narrowing its preemptive scope. These efforts are equally unavailing.

Petitioner first argues that Section 1334(b) uses the words “based on smoking and health” in what he calls an “asymmetrical” manner—so that a “prohibition” on misstatements is “based on smoking and health” only if it rests on a smoking-specific “norm,” while a “requirement” of an additional warning is “based on smoking and health” regardless of whether it rests on a smoking-specific “norm.” This argument is flatly contradicted by the words of the statute. Section 1334(b) is *not* asymmetrical, but perfectly symmetrical: it treats “requirement[s]” and “prohibition[s]” identically. As a pure textual matter, therefore, the phrase “based on smoking and health” cannot be given a different meaning depending on whether the State seeks to impose a “requirement” or “prohibition.” And petitioner’s need to distinguish requirements from prohibitions in Section 1334(b) thus disproves his interpretation of the phrase “based on smoking and health.”

In any event, the meaning that petitioner now attributes to the phrase is inherently unnatural. When a State tells a cigarette company what it may or may not say about the effects of smoking on health, that command is “based on smoking and health,” regardless of the “ultimate” source of the “norm,” or whether the State does so through its legislature, through its agencies (promulgating a smoking-specific rule or adjudicating a case under a general statutory norm), or through its courts (applying general or specific standards). *See, e.g., Garmon*, 359

U.S. at 244 & n.3 (general tort law and labor-specific statutes treated the same); *Pilot Life Ins. Co. v. Dedaux*, 481 U.S. 41, 47-48 (1987) (preemption under “relates to” phrase in ERISA applies to common law tort and contract causes of action, and is not limited to state measures designed to address the subject of ERISA). Moreover, there is a perfectly apparent explanation for the presence of “based on smoking and health” in Section 1334: rather than introducing some awkward concept of generality, Congress simply intended to ensure that preemption reached only standards for cigarette advertising and promotion that were “health-related” (*see* S. Rep. No. 566, 91st Cong., 1st Sess. 1 (1969)), and not (for example) those requiring an accurate statement about the number of cigarettes in a package or the price.

Petitioner also attempts to limit preemption by giving some sort of undefined but narrow meaning to the words “package,” “advertising,” and “promotion” in Section 1334. But this effort not only deprives the words of their most natural meaning, it separates the preemption provision from the statute as a whole and, most particularly, from the goals that Congress—in Section 1331, again unmentioned by petitioner—declared as its objective. The language of Section 1334 is intended to bar States from imposing their own obligations with respect to those channels through which cigarette companies communicate to the public—packages, advertising, and promotional campaigns (such as mailings). Given that purpose, it is simply irrational to attribute to Congress, as petitioner does, the intent to leave States nonetheless free to regulate (through *any* means, including statute, agency rule, or judicial decision) what the cigarette companies say or do not say to consumers about smoking and health, provided that the States try to characterize their efforts as directed to some other (unspecified) methods of communication. It seems even more irrational when it is recognized that such regulation would produce the very results—each State’s resetting the *federal* balance among

various national policies and imposing excessive burdens, producing confusion, and generating disuniformity—that Congress expressly rejected in the field covered by the Cigarette Labeling and Advertising Act.

Respectfully submitted,

H. BARTOW FARR, III \*

RICHARD G. TARANTO

KLEIN, FARR, SMITH & TARANTO

2550 M Street, N.W.

Washington, D.C. 20037

(202) 775-0184

*Attorneys for Respondents*

\* Counsel of Record

*Of Counsel:*

MUDGE, ROSE, GUTHRIE,

ALEXANDER & FERDON

180 Maiden Lane

New York, NY 10038

ARNOLD & PORTER

1200 New Hampshire Ave., N.W.

Washington, D.C. 20036

SHOOK, HARDY & BACON

One Kansas City Place

1200 Main Street

Kansas City, MO 64105

Dated: January 15, 1992